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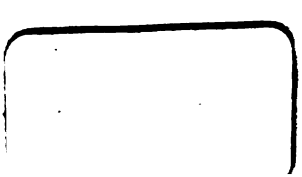

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

SEPTEMBER TERM, 1917 AND THE TERMS OF SEPTEMBER, 1920 AND JANUARY, 1921.

NEWTON C. GARBUTT, REPORTER.

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Term expired January, 1921.

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Cases Argued and Determined

In

The Supreme Court

of the

State of Colorado

At September Term, A. D. 1917

No. 8625.

THE COLORADO SPRINGS & INTERURBAN RAILWAY CO. *v.* REESE.

Decided December 3, 1917.

Action in damages against a street railway corporation for personal injuries. Judgment for plaintiff.

Affirmed.
On Petition for Rehearing.

1. NEGLIGENCE—*Personal Injuries—Pleading.* In a personal injury case the cause of action is the injury sustained by plaintiff through the negligence of defendant, and whether the negligence is charged specifically, generally or both, is immaterial if the pleading is not questioned.

2. *Pleading—Res Ipsa Loquitur.* If plaintiff in one count alleges negligence generally as the cause of his injury, he may rely upon the maxim *res ipsa loquitur* to establish it; if in a different count he alleges specific negligence he may rely upon any pertinent evidence to prove his case.

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3. *Res Ipsa Loquitur.* The contention that the complicated character of the machinery involved excludes the application of the doctrine *res ipsa loquitur*, not approved.

4. MAXIM—*Res Ipsa Loquitur.* The doctrine simply carries the case to the jury permitting it to infer negligence, and find on all the evidence whether plaintiff has sustained the burden of proof.

5. APPEAL AND ERROR—*Findings of Fact by Nisi Prius Courts.* In the determination of the amount or degree of certainty that must exist in the evidence to substantiate facts in issue, appellate tribunals should rely upon the judgment and perception of nisi prius judges and the agencies which they employ to ascertain the facts. Findings of fact will not be disturbed when supported by evidence.

6. *Evidence—Admission without Objection.* Counsel are officers of the court, charged with the duty of guarding it against errors at the trial, and when they acquiesce in the admission of evidence may not, after verdict, claim it was improperly received.

7. EVIDENCE—*Inspection, question for the Jury.* In this case the questions of inspection or lack of inspection, were properly left to the jury.

Error to the District Court of El Paso County, Hon. W. S. Morris, Judge.

Messrs. CHINN & STRICKLER, Mr. GEORGE W. MUSSER, Mr. J. ALFRED RITTER, for plaintiff in error.

Messrs. ORR, ROBINETT & MASON, Mr. L. W. CUNNINGHAM, for defendant in error.

En banc.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

REESE, plaintiff below, recovered a judgment against the Colorado Springs & Interurban Railway Company, a corporation, in damages for personal injuries sustained by him through the alleged negligence of the defendant corporation. The defendant operates a street car system in Colorado City, and on the afternoon of June 19, 1914,

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plaintiff was a passenger on one of its cars when an explosion occurred in or about the controller, appliances, and apparatus in the front of the car, whereby the vestibule and front part of the car became filled with smoke and flames. It is alleged that as a result thereof plaintiff was placed in a situation of apparent and imminent peril, and, believing that his safety required him to immediately leave the car, he, without further deliberation, jumped therefrom, and sustained the injuries of which complaint is made. The language in which the negligence of the defendant is charged is as follows, to-wit:

"Plaintiff alleges that he sustained said injuries solely by reason of the negligence and carelessness of defendant and its employes having the management and control of said car at said time; that plaintiff is unable, for lack of knowledge, to definitely specify said negligence and carelessness, or to specify definitely the cause of said explosion; that plaintiff is informed and believes, and upon such information and belief alleges, that defendant negligently and carelessly provided, operated, and caused to be operated said car at said time when the controller, machinery, appliances, and parts of said car connected with and used in the operation and control of the motive power thereof were out of repair and insecure and in a defective condition, and that by reason thereof said car was dangerous and unsafe for the transportation of plaintiff as a passenger at said time; that plaintiff is, for lack of knowledge, unable to specify more fully than as above stated the insecure, unsafe, dangerous, and defective condition of said car, its machinery, appliances, apparatus, and parts aforesaid. And plaintiff further alleges that, while said car and its controller, machinery, appliances, apparatus, and parts aforesaid were insecure and in said dangerous, unsafe, and defective condition, the employes of defendant operating said car so carelessly and negligently operated the same as that in consequence of the aforesaid defective condition of said controller, machinery, appliances, apparatus, and parts of said car, and the careless and negligent manner in which

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the same was operated by the employes of defendant at said time, there was an explosion of the controller or some other part of the apparatus of said car unknown to plaintiff, which caused said car to become filled with smoke and flames; that plaintiff is unable, for lack of knowledge thereof, to more definitely allege the negligence or carelessness of the said employes in operating said car."

The complaint was not questioned. The defendant, however, denied negligence, pleaded contributory negligence, and that the explosion was caused by a bolt or flash of lightning at the time coming in contact with the controller box located in the front vestibule of the car, causing the mechanism thereof to catch fire. By replication the plaintiff denied the material allegations of the answer, and alleged that the car was not equipped with sufficient and proper appliances for the purpose of arresting lightning, and if the car was struck by lightning, it was by reason of the negligence of the defendant.

At the close of the evidence defendant moved for an instructed verdict, which was refused, and this action of the court is presented as the first ground for reversal. The claim is that plaintiff did not prove the specific negligence alleged, and that a prima facie case for plaintiff may not arise under the doctrine of *res ipsa loquitur*. The basis of this contention is threefold: First, that having alleged a case of specific negligence, plaintiff thereby abandoned the right to the presumption arising from the rule by voluntarily taking upon himself the burden of proving the particular negligence charged; second, that the maxim may not be applied to a case growing out of the use of complicated machinery such as that here involved; and, third, that the evidence was insufficient to carry the case to the jury.

We think plaintiff has pleaded negligence both generally and specifically, and, if he has proved either, has established a cause of action against defendant. The cause of action was the injury sustained by plaintiff through the negligence of defendant and whether the former charged such negligence specifically, generally, or both, is imma-

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terial when, as here, the manner of pleading was not questioned by defendant. Had plaintiff in one count alleged negligence generally as the cause of his injury it is clear that he could rely upon the maxim to establish it. It is equally certain that, had he, in a different count, set forth his cause of action by allegations of specific negligence, he could rely upon any pertinent evidence to establish the same. *Colorado & Southern Railway Co. v. Jenkins*, 25 Colo. App. 348, 138 Pac. 437. The legal presumption, when applicable, is conditioned on the absence of other evidence of negligence, not on the absence of averments of negligence in the complaint, and a party may rely upon it, even though his pleading states the facts of the negligence of which complaint is made, if such facts are the ones which the legal inference of negligence tends to establish. *Walters, by Guardian Ad Litem, v. Seattle R. & S. Ry. Co.*, 48 Wash. 233, 93 Pac. 419, 24 L. R. A. (N. S.) 788, and cases cited in the note thereto approving this view. The presumption is simply a rule dispensing with actual evidence in the first instance, and applies where the circumstances, unexplained, point to negligence and would justify an inference thereof. *Kansas Pacific Ry. Co. v. Miller*, 2 Colo. 442, 457, 458.

Therefore under general allegations of negligence the application of the maxim would necessarily require a defendant to come forward with sufficient proof to overcome the presumption by showing a state of facts from which the jury would not be justified in inferring that any negligence of the defendant caused the accident from which the injury resulted; while under allegations of specific negligence only the burden of defendant would be discharged when from all the evidence the jury would not be warranted in finding that the accident causing the injury was due to the specific negligence alleged. *Kluska v. Yeomans*, 54 Wash. 485, 103 Pac. 819, 132 Am. St. Rep. 1121; *Dearden v. San Pedro, L. A. & S. L. R. Co.*, 33 Utah 147, 93 Pac. 271.

The allegations of general and specific negligence were in no wise inconsistent, and proof of the specific negligence alleged would in no sense be adverse to the presumption

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arising from the facts of the accident, but entirely consistent therewith.

The contention of plaintiff in error that the complicated character of the machinery involved excludes the application of the doctrine of *res ipsa loquitur* does not meet our approval. The case of *Beebe v. St. Louis Transit Co.*, 206 Mo. 419, 103 S. W. 1019, 12 L. R. A. (N. S.) 760, cited in support of the contention, is not in point. In that case the plaintiff, the injured party, was the servant of the defendant and in actual control of the mechanism in which the explosion causing the injury occurred. An entirely different situation arises where, as here, the injured party was a passenger upon the car of a common carrier, and such injury was occasioned by an explosion of unusual severity and character in machinery wholly within the control of the carrier. The following cases are directly in point: *Chicago Union T. Co. v. Newmiller*, 116 Ill. App. 625, affirmed in 215 Ill. 383, 74 N. E. 410; *Firebaugh v. Seattle E. Co.*, 40 Wash. 658, 82 Pac. 995, 2 L. R. A. (N. S.) 836, 111 Am. St. Rep. 990.

In the instant case there was a contract relation between the parties, with the resulting duty of the carrier to exercise the highest degree of practicable care and skill to transport the plaintiff safely. The rule requiring such degree of care would be of little value if it were not enforced in judicial administration by a correlative rule of evidence. The application of the latter rule to a given case is simply a matter of common sense. It may, and usually does, apply where an unusual or unexpected accident happens caused by machinery under the exclusive management or control of a defendant. Under such circumstances the accident speaks for itself, and creates a presumption of defendant's negligence. It is not alone the injury, however, but the manner and circumstances thereof, that give rise to the presumption. In such cases the *res* includes the attending circumstances, and the application of the rule of *res ipsa loquitur* involves principally the question and sufficiency of circumstantial evidence to justify the jury in inferring the

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existence of the principal fact at issue—the defendant's negligence.

The doctrine does not dispense with the necessity that the plaintiff prove the fact of negligence, but is itself a mode of proving negligence, and is therefore evidence. *Lyles v. Brannon Car Co.*, 140 N. C. 25, 52 S. E. 233. It simply carries the case to the jury permitting it to infer negligence and find on all the evidence whether plaintiff has sustained the burden of proof. *Ross v. Cotton Mills*, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. (N. S.) 298. In the case at bar there can be no question that the physical facts surrounding the accident were such as to create a reasonable probability that the accident was the result of defendant's negligence. When plaintiff showed the physical act of an explosion in the controller and the relation of defendant to that instrument, the conclusion that negligence superinduced the accident followed as a legitimate deduction of fact, and the plaintiff, notwithstanding defendant's attempted exculpation, was not under the necessity of showing the particular negligence that produced the explosion in order to carry the case to the jury. As said in *Cook v. Newhall*, 213 Mass. 392, 395, 101 N. E. 72, 73:

"The whole body of the evidence may be such that no particular negligence can be found, and yet the accident may indicate some negligence, the details of which cannot be ascertained."

And in *Cassady v. Old Colony St. Ry. Co.*, 184 Mass. 156, 163, 68 N. E. 10, 12 (63 L. R. A. 285) it is said:

"* * * If at the close of the evidence the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon a presumption, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it."

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To the same effect is *Sullivan v. Rowe et al.*, 194 Mass. 500, 80 N. E. 459.

No one claims that the defendant was under the necessity of showing the actual cause of the accident. It could escape liability by showing that through no fault of it did the accident occur. The true rule is tersely stated in *Gleeson v. Virginia M. R. R. Co.*, 140 U. S. 435, at page 444, 11 Sup. Ct. 859, 862 (35 L. Ed. 458), where Mr. Justice Lamar, speaking for that high court, says:

"The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff had made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances."

Of course, a case may arise where the court should peremptorily instruct the jury to find for the defendant or to nonsuit the plaintiff, and if it did not do so it would be error. Such would be true where the plaintiff's own evidence shows that the accident was due to a cause beyond the control of the defendant, as the presence of *vis major* or the act of a stranger or his own contributory negligence. It would be equally true where from the undisputed evidence of the entire case but one conclusion would be justified. The question of negligence would then become a matter of law to be determined by the court, and such is the case of *D. & R. G. R. R. Co. v. Andrews*, 11 Colo. App. 204, 53 Pac. 518, and *Pullman, etc., Co. v. Freudenstein*, 3 Colo. App. 540, 34 Pac. 578. In the former case the undisputed

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evidence showed that the cause of the accident was *vis major*, to wit, a snowslide in territory where snowslides had not occurred before; and in the latter case an overcoat was lost in a Pullman car occupied at the time by several passengers and in charge of a porter, and it was held that the simple fact of the disappearance of the overcoat did not render the company liable. In that case the facts of the loss of the overcoat—the passengers on the train having access thereto as well as the servant of the defendant—were not of such an unusual nature as to justify the inference that such loss was due to negligence on the part of the master. Clearly neither of these cases are applicable to the facts of this case. Other cases relied upon in support of the contention that the case should not have been submitted to the jury are equally irrelevant. In fact, *Omaha Street Ry. Co. v. Boesen*, 74 Neb. 764, 105 N. W. 303, 4 L. R. A. (N. S.) 122, while stating that:

"When the proof of such accident (where the doctrine of *res ipsa loquitur* applies) is met by proof of other facts and circumstances making it equally probable that it was the result of causes wholly beyond the control of the defendant, and which no human skill and foresight could have guarded against or prevented, one probability offsets the other, and the affirmative of the issue, in the absence of other evidence tending to establish it, stands, just as it stood at the beginning of the controversy, not proved,"

—nevertheless holds that whether such matters have been established must be determined by the jury. 74 Neb. 766, 768, 105 N. W. 304, 4 L. R. A. (N. S.) 122. The above language from that opinion was upon the correctness of an instruction that:

"It devolved upon the defendant to show by a preponderance of the evidence that the injuries were not due in any degree to a failure on the part of the defendant to exercise the utmost care, diligence, and foresight for the safety of its passengers."

And it was very properly held that the instruction placed a greater burden upon the defendant than the law imposed,

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as it devolved upon plaintiff to establish his case by a preponderance of the evidence. 74 Neb. 766, 105 N. W. 304, 4 L. R. A. (N. S.) 122, supra. The defendant, however, had "asked the (trial) court to instruct the jury to the effect that, although they found that the car was derailed, yet if they found that at the time and place of the accident the car and track were in good order and condition, and without defect or imperfection, the presumption arising from the derailment of the car would be thereby overcome," and the appellate tribunal (74 Neb. on page 768, 105 N. W. 304, 4 L. R. A. [N. S.] 122), said:

"It was not error to refuse this instruction, because it ignores the inference of negligence in the operation of the car which the jury might legitimately draw from the fact of derailment."

In *Goss v. Northern Pacific R. Co.*, 48 Or. 439, 441, 87 Pac. 149, 150:

The case "made out by the testimony of the plaintiff and all the other witnesses was simply the sudden closing of a car door, the fastenings of which were in good repair, on a train moving at the usual rate of speed, and without any proof that it was due to the negligence of the defendant or of any facts from which an inference of negligence could be drawn."

The court points out that ordinarily the mere fact of an accident does not *per se* raise a presumption of negligence, but often negligence may be implied from the facts and circumstances disclosed, and continues:

"Thus, where the evidence shows that the defendant had the exclusive management and control of the thing which caused the injury, or where it appears that the accident occurred through some defect in the vehicle, machinery, roadbed, or appliances, the circumstances, if unexplained, may be sufficient to justify a jury in drawing the inference of negligence, under the rule of *res ipsa loquitur*. * * * But in nearly, if not quite, every case that has come under our notice in which the rule has been applied, it appeared either that the thing causing the injury was under the ex-

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clusive control of the defendant, or that the injury resulted from the breaking of machinery, the derailment of cars, or something improper or unsafe in the appliance or the conduct of the business; in other words, that it was not the injury alone from which the negligence was presumed, but the manner and circumstances under which it occurred, which justified the application of the maxim."

It is then said that:

"The car door which caused the injury to the plaintiff was not under the exclusive control of the defendant, but was being constantly used by passengers boarding and alighting from the train and in going from one car to another, and there is no evidence that it was or had been opened or fastened by the defendant's employes, and not by a passenger."

The evidence would warrant but one conclusion, the failure of the plaintiff to supply the burden of proof. The attending circumstances which were a part of the *res* exonerated the defendant of the charge of negligence.

Green v. Urban Contracting & Heating Co., 106 App. Div. 460, 94 N. Y. Supp. 743, is equally inapplicable. The machinery of an elevator was in perfect order, and a tenant of the building on coming to work in the morning found the elevator standing at a floor, with the door open, and, while waiting for the operator to arrive, he stood partly on the elevator and partly on the floor, talking to persons in the elevator, and for some unaccountable reason the elevator started, whereby he was killed. It is pointed out in the opinion that there was no invitation to the party killed to place himself in the position of danger and that:

"In the absence of the elevator boy, these men (the deceased and his associates to whom he was talking) had no business in the elevator. It stood there empty, without any one in control of it, and was not in a condition for use."

And further, on page 464 of 106 App. Div., on page 746 of 94 N. Y. Supp., it is said:

"The elevator boy at the time had gone down into the cellar, and was preparing for his day's work. The elevator

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had not been used on this morning. No one had been invited on this morning to use it, and, until the boy whose duty it was to operate the elevator had arrived and taken charge of it, it was not in a condition to be used."

The holding is (106 App. Div. 466, 94 N. Y. Supp. 747) that:

"* * * The plaintiff's intestate was guilty of contributory negligence, as a matter of law, in placing himself in this position with one foot upon the elevator and the other on the floor of the building, when there was no one in charge of the elevator, and it was his negligence that caused the injury."

In *Stearns v. Ontario Spinning Co.*, 184 Pa. 519, 39 Atl. 292, 39 L. R. A. 842, 63 Am. St. Rep. 807, after stating that no contractual relation existed between the party injured and the defendant or its servants, it is said (184 Pa. on page 523, 39 Atl. 292, 39 L. R. A. 842, 63 Am. St. Rep. 807):

"It is therefore unnecessary in this case to consider whether proof of the accident and its attending circumstances was sufficient to put the defendant to its defense; for, if any presumption of negligence had been raised by the previous testimony, it was a presumption of fact only, and was entirely rebutted by the testimony of Clement, the defendant's employe, who was the last witness called by the plaintiff."

Thus the plaintiff in his own case showed the nonliability of the defendant. Clearly then, this case does not support the proposition for which it is cited. On the contrary, the true rule is recognized and applied to that state as shown in *McCafferty v. Railroad Co.*, 193 Pa. 339, 344, 44 Atl. 435 (74 Am. St. Rep. 690), where it is said:

"This presumption, having once arisen, remained until overcome by countervailing proof. Whether it was so overcome was a question of fact for the jury. It had the same effect in shifting the burden of proof that affirmative evidence of negligence would have had. *Penna. R. Co. v. Miller*, 87 Pa. 395; *Penna. R. Co. v. Weiss*, 87 Pa. 447;

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Spear v. P., W. & B. R. R. Co., 119 Pa. 61 (12 Atl. 824). In *Railroad Co. v. Weiss, supra,* it was said: 'The presumption of fact in law which carries a case to the jury necessarily leaves them in possession of the case, and although the evidence to rebut the presumption may be very strong, yet it is a matter for the jury, and not for the court.' "

Sweeney v. Edison Co., 158 App. Div. 449, 143 N. Y. Supp. 636, does not discuss the question as to whether the cause should be submitted to the jury, but clearly implies that it should. The discussion in the opinion is upon the question of a requested instruction on the part of the defendant to the effect that it was not incumbent upon it to show the actual cause of the accident. Another case cited upon this point is *Tuttle v. C., R. I. & P. R. Co.*, 48 Iowa, 236, which is of like character, turning solely upon an instruction given that placed a greater burden upon the defendant than the law justified. To review other cases is unnecessary. We are quite certain that the weight of authority is that, where a passenger, who is himself without fault, is injured upon the cars of either a steam railroad or a street railway, by the failure to properly discharge its functions by any of those instrumentalities which the carrier is bound to supply, or which is the result of a failure in any respect of its means of transportation, or the conduct of its servants in connection therewith, a presumption of negligence arises as against the carrier; and if upon the whole evidence in the case different minds might fairly and honestly reach different conclusions respecting the negligence of the carrier, a court may not lawfully end the case, but should permit the jury, under proper instructions, to pass upon the question of liability. We are equally certain that the case at bar comes within this rule. It was not established by undisputed evidence that the explosion in the controller was caused by lightning, but only that there was a probability that it was so caused. In fact, the evidence is in conflict as to whether or not there was any flash of lightning at the time of or immediately preceding the ex-

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plosion. Several witnesses testified that there was no lightning at the time; and there was evidence tending to show that overfeeding of the controller by the motorman, as well as defects in the attachment and appliance of the car and lightning arrester, might produce just such an explosion as that which occurred.

There was no attempt made to prove that the motorman who had charge of the car at the time of the accident was a skillful or even competent man, or that he had not overfed the controller. It is claimed that because the evidence showed that the motorman had been employed by defendant as a motorman for 16 years, and that he said that when he saw the lightning coming direct for him he did not speed up, but was already under full headway; it was conclusively established, by undisputed evidence, that he was qualified and competent, and in no wise negligent at the particular time, and could not have suddenly overfed the controller. The facts do not warrant the conclusion. On the contrary, it is common knowledge that competent and experienced motormen, engineers, and drivers of cars are at times negligent, and that going at "full headway" by electric car in no sense established the fact that there could not be a sudden overfeeding of the controller. Furthermore, the motorman's competency and freedom from negligence could not be established, either by himself or by other witnesses called for that express purpose. That which he did or did not do in the premises could be accepted in evidence, and therefrom the jury, and it only, was competent to find the truth in relation to the matter. The law which controls upon this feature of the case is stated in an opinion of this court, *Victor v. Smilanich*, 54 Colo. 479, 484, 131 Pac. 392, 395, in the following language:

"The employes say they did not leave them (explosive caps) there; and although this testimony is not directly controverted, the jury must have determined they did, and the trial judge has ruled that the evidence was sufficient to not only submit this question to the jury, but also sufficient to justify this finding of fact by them. It does not always

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follow that because positive testimony of a witness is not directly controverted that a jury must treat such evidence as true. A witness may be contradicted by circumstances, as well as by statements of others contrary to his own. In such cases neither courts nor juries are bound to refrain from exercising their own judgment as to the probative value of his testimony."

In the case at bar the trial court refused to instruct a verdict in defendant's favor at the close of all the evidence. The jury found in plaintiff's favor, and the court thereafter, upon motion for new trial, refused to disturb that finding, and rendered judgment accordingly. In the determination of the amount or degree of certainty that must exist in the evidence to substantiate facts in issue, appellate tribunals should rely upon the judgment and perception of *nisi prius* judges and the agencies which they employ to ascertain the facts.

It is contended, however, that plaintiff was guilty of contributory negligence, as there was nothing in the situation to make a reasonably prudent person act as he did. If the plaintiff acted unreasonably, rashly, or became frightened at trivial occurrences, not calculated to alarm a person of common prudence, and thereby brought injury upon himself, the defendant is not liable. These questions, however, were submitted to the jury for determination under proper instructions, and we think there was sufficient evidence to warrant the conclusion that plaintiff's conduct at the time was not unreasonable but conformed to that of ordinarily careful men under like circumstances. *Colo. Midland Ry. Co. v. Robbins,* 30 Colo. 449, 461, 71 Pac. 371; *D. & B. P. Transit Co. v. Dwyer,* 20 Colo. 132, 36 Pac. 1106; *Chicago Union Trac. Co. v. Newmiller, supra.*

It is claimed that there was error in the admission of certain expert testimony relative to the explosion in the controller. Defendant made no objection to the introduction of this evidence, and the claim that there was error in admitting it was first presented to the trial court in the motion for new trial. Counsel are officers of the court, and are

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charged with the duty of guarding it against errors at the trial, and when they acquiesce in the admission of evidence, may not be permitted, after verdict, to claim that such evidence was improperly admitted to the prejudice of their client. If objection had been seasonably made to this evidence, the trial court might have excluded or withdrawn it from the jury. *Keener v. Wilkinson,* 33 Colo. 445, 448, 80 Pac. 1043; *Holland v. People,* 30 Colo. 94, 99, 69 Pac. 519; *Cone v. Montgomery,* 25 Colo. 277, 53 Pac. 1052.

It is claimed that the undisputed evidence established the fact that the controller was an approved device, the best in use on street railways; that it had been properly inspected and was in perfect condition immediately preceding the explosion; that the lightning arresters in use were of the best device known, and the defendant had exercised the highest degree of care reasonably to be expected from human vigilance and foresight in view of the character of the conveyance adopted and consistent with the practical prosecution of its business; and that the court in refusing to so instruct the jury at the request of the defendant, by instructions allowing the jury to pass upon such questions, committed error to the prejudice of the defendant necessitating a reversal of the judgment. We think the record does not warrant our condemnation of the court's action in the premises. While defendant's night foreman, Rowe, testified quite fully that it was part of his duty to inspect and examine the controllers, and detailed an examination of the one in question on the night before the accident, and declared it in good condition, he nevertheless stated specifically that it was not his business to make "any test of the insulation of the controller," and that he did not.

Witness Reid, day foreman of defendant, testified that it was a part of his duty to inspect and repair lightning arresters on the cars, and that he inspected the arrester in question the day after the accident, "and found that it was in good condition," without stating the things he did in making the examination. He also said that it had not been repaired in the meantime. These were legal conclusions

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only. He later stated that all examinations or inspections of the arrester before the accident were made by Alonzo Henry, who was not a witness in the case. This witness further testified that when a lightning arrester is in perfect order "the lightning is supposed to discharge itself to the earth across the gap." And an expert witness for plaintiff, fully qualified, testified without objections that, had lightning struck the controller, no explosion could have resulted had the appliances been in proper condition; that the explosion in question could have been caused by a defect in the controller, or machinery, or appliances, or apparatus, or by the motorman feeding the current too fast. Furthermore, no claim is made by defendant that any inspection of this lightning arrester occurred subsequent to March 19, 1914, until the next day after the happening of the accident; which was on June 19th of the same year.

We think that under the facts of the case the questions of inspection or lack of inspection of the controller, the lightning arresters, and the insulations thereof prior to the accident were properly left to the jury. *Victor v. Smilanich, supra.*

The other objections argued have been considered, but we deem it unnecessary to discuss them here, as they are clearly without merit. It follows that the opinion of this court, heretofore entered herein should be withdrawn, and the judgment of the trial court affirmed; and it is so ordered.

Mr. Justice Scott dissents.

No. 8797.

McPHAIL v. THE CITY AND COUNTY OF DENVER.

Decided March 5, 1917.

Action for damages alleged to have been caused by negligence of the city in permitting plaintiff's property to be flooded with water. Judgment for defendant.

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Affirmed.

1. APPEAL AND ERROR—*Deficient abstract.* Error assigned to rulings of the court in passing on the admissibility of testimony will not be considered where the abstract of record contains no testimony, objections or exceptions.

2. *Deficient abstract—Instructions.* The appellate court will not review the action of the trial court in ruling on instructions which relate to the effect of the evidence where the abstract contains none of the testimony and also fails to show any objections or exceptions to instructions given or refused.

3. PRESUMPTIONS—*Proper verdict and judgment.* Where there is nothing in the record from which the appellate court can conclude there was error in the proceedings in the trial below, it will be presumed that the cause was fairly tried, submitted on proper instructions and that the verdict and judgment are sustained by the evidence.

Error to the District Court of the City and County of Denver, Hon. George W. Allen, Judge.

MR. DUNCAN McPHAIL, *Pro se.*

Mr. JAMES A. MARSH, Mr. G. Q. RICHMOND, for defendant in error.

MR. JUSTICE GARRIGUES delivered the opinion of the court.

THIS case is brought here on error to review a judgment of the district court of the City and County of Denver. The errors assigned relate to rulings of the court on the admission and striking of testimony, to instructions given and requested instructions refused.

1. On an inspection of the printed record in the case, we find no testimony presented for our consideration. We are not advised what questions were objected to, nor the grounds of the objections. As to whether any exceptions were saved to these rulings of the court, the record is silent. We are therefore unable to pass upon the questions attempted to be raised. Abstracts of records, in order to comply with the rules of this court, must contain sufficient of the proceedings to enable the court to fully understand

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and determine the questions presented for decision, and assignments of error relative to evidence, will not be considered where the abstract does not contain the objections and exceptions to the rulings of the trial court and the testimony to which they apply. *Haley v. Elliott*, 16 Colo. 159, 26 Pac. 559; *Thompson v. Deweese*, 25 Colo. 243, 53 Pac. 507; *San Miguel Co. v. Bonner*, 33 Colo. 207-213, 79 Pac. 1025; *McPhee & McGinnity v. Fowler*, 36 Colo. 202, 85 Pac. 421; *Wilson v. Kent*, 38 Colo. 492, 88 Pac. 461; *Purdy v. Geary*, 45 Colo. 129, 100 Pac. 426; *Guillet v. Gorman*, 23 Colo. App. 216, 128 Pac. 878; *Empire Co. v. Gibson*, 23 Colo. App. 399, 128 Pac. 472.

2. There is nothing in the abstract to show what, if any objections, plaintiff in error made to the giving of instructions by the court, neither does it appear that any exceptions were saved to any rulings on objections, or to the giving of instructions. But aside from this, even if exceptions were reserved, as the abstract does not contain any of the testimony, we cannot review the action of the court in ruling on instructions which relate to the effect of the evidence. *Christy v. Campbell*, 36 Colo. 261, 87 Pac. 548; *Gill v. Schneider*, 48 Colo. 382, 110 Pac. 62.

There being nothing in the record from which we can conclude there was error in the proceedings in the trial below, we must presume the cause was fairly tried, submitted to the jury on proper instructions and that the verdict and judgment were sustained by the evidence. The judgment is accordingly affirmed.

Chief Justice White and Mr. Justice Scott concur.

No. 8885.

WIGTON v. WIGTON.

Decided November 5, 1917. Rehearing denied December 3, 1917.

Action in replevin, judgment for plaintiff.

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Reversed.

1. APPEAL—*Statutory Construction.* Statutes giving the right of appeal are liberally construed in furtherance of justice. Interpretation that will work a forfeiture of the right is not favored.

2. *From County to District Court—Clerk's Docket Fee.* Under sec. 1538, R. S. 1908, a case may be docketed on appeal without payment of clerk's fees in advance if the clerk shall waive advance payment or agree to accept it at some future time.

Sec. 2528 R. S. 1908, providing for the payment of clerk's fees in advance, is permissive only and not mandatory.

3. REPLEVIN—*Verdict—Judgment.* In a replevin action where the verdict is primarily for possession of the property in suit, judgment should be for possession of the property, and for the value thereof only in the event that recovery of the specific property may not be had.

Error to the District Court of Pueblo County, Hon. C. S. Essex, Judge.

MR. JOHN H. VOORHEES, for plaintiff in error.

Mr. E. O. PHLEGAR, for defendant in error.

En banc.

MR. JUSTICE SCOTT delivered the opinion of the court.

THIS is an action in replevin by the defendant in error, against the plaintiff in error to recover possession of two certain account books described in the complaint as follows:

"One Day Book, containing the entries of loans made and the amounts thereof and the parties to whom made by the plaintiff from about December 1st, 1914, to about April 25th, 1915, which said book is of the value of Five Hundred Dollars.

One Ledger containing the names of parties to whom plaintiff has made loans, the amounts thereof, and the payment made thereon, which book contains the account of the transactions of plaintiff the past five or six years to the present date, which book is of the value of Five Hundred Dollars."

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Verdict and judgment for plaintiff below.

The first question for consideration, upon cross error, is the action of the trial court in overruling the motion of defendant below to remand to the county court the transcript and all papers in the cause, for procedure as though no appeal had been taken, for the reason that the appellant has failed to docket his appeal as required by law. Sec. 1538, Rev. Stat. 1908.

The action was instituted in the county court and verdict and judgment there rendered in favor of the plaintiff, and from which judgment the defendant appealed to the district court. Judgment was rendered in the county court on the 8th day of July, 1915. Transcript and appeal bond were properly filed with and the bond approved by the clerk of the district court on the 16th day of July, 1915, and on the same day the cause was entered upon the docket of that court. The docket fee was not actually paid to the clerk of the district court until the 30th day of August, 1915.

It will be seen that the cause was properly filed and docketed within the ten days required by statute. The sole ground for the motion is that the docket fee was not paid within thirty days. Upon this point the deputy clerk of the district court testified as follows:

"About July 10th or 12th, Judge Voorhees came into the office and said there would be a case appealed from the county court and said I should docket it and bill on him for it; Judge Voorhees has an account and we docketed the case and put it in his account. We docketed the case at once when transcript came up. We send out bills the first of each month; I do not know whether this bill was sent out or not as I was away on my vacation. The record shows docket fee paid August 30, 1915.

Q. I will ask you, upon the statement I made to you, did you extend to me as attorney, credit for the docket fee in this case? A. I did."

The question to be determined is, was this a sufficient compliance with the statute as to the payment of the docket fee as to justify the district court in retaining jurisdiction

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of the cause. The precise question seems not to have been determined by this court nor by the Court of Appeals.

In the consideration of the question we bear in mind that statutes giving the right of appeal are liberally construed in furtherance of justice and that such interpretation as will work a forfeiture of the right is not favored. In *Childers v. Baird*, 59 Colo. 382, 148 Pac. 854, we declared the principle that where the parties act in good faith and with reasonable promptness, the courts deal with them liberally, and that courts are reluctant to permit an appeal to fail where there has been no culpable fault, although there may have been some errors or irregularities.

Counsel for defendant in error rely chiefly on *Tierney v. Campbell*, 7 Colo. App. 299, 44 Pac. 948, and *Thomas v. Beattie*, 42 Colo. 235, 93 Pac. 1093. It is clear that the language in the first of these cases conveys the impression that the deposit of the fee is a part of the statutory process of appeal and that a failure or neglect to make such deposit deprives the District Court of jurisdiction of the cause. It is just as clear that it was not necessary to so determine in that case.

The language relied on in *Tierney v. Campbell, supra*, is as follows:

"The taking and manner of perfecting appeals is regulated by statute, a strict compliance with which is requisite. Otherwise no appeal is taken. While the proceedings in the county court by the filing of the bond, etc., were sufficient to divest that court of jurisdiction, to perfect the appeal and confer jurisdiction on the Appellate Court required the payment of the docket fee and the docketing of the case. Unless the docket fee was paid and the case docketed within 30 days, no appeal was perfected and no jurisdiction conferred upon the district court, and it became the duty of the clerk to transmit the papers to the county court from which they came."

But in that case not only was the docket fee not paid, but the case was not docketed, and while it was not so stated in the opinion, it may be well assumed that the case was

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not docketed for the reason that the docket fee was not paid, which was clearly within the right of the clerk to refuse under the statute.

In *Thomas v. Beattie, supra,* it appears that more than thirty days had elapsed after the papers were lodged in the district court before the appellant paid his docket fee, and as in *Tierney v. Campbell,* it does not appear that the case was docketed by the clerk, which may have been for the same reason as we have suggested in the latter case. Then, under the facts in both cases relied on, there was a failure to docket, coupled with a failure to pay the docket fee. In neither case was there any pretense of waiver or other reason or excuse for not tendering or paying the fee, and it was only upon such payment, the appellant was entitled as a matter of right to have his appeal docketed.

In *People v. District Court,* 33 Colo. 416, 80 Pac. 1069, it was held that where the appellant had complied with the requirements of the statute within the prescribed time, the failure of the clerk to formally enter it on the docket could not defeat the appeal, and this notwithstanding the specific language of the statute "that in case the case is not docketed the case may be remitted, etc." The court adopted the common sense view that when the appellant had done all that the law required of him, it was sufficient. But the important declaration in that case was the repudiation of the statement in *Tierney v. Campbell,* that the payment of the fee and the docketing of the case was jurisdictional, but holding to the contrary that this pertained to procedure, and was in the nature of a penalty. It was there said:

"In *Tierney v. Campbell, supra,* the appellant did not pay the docket fee, or deposit the amount required by the rules of the district court, until more than thirty days had elapsed after the appeal was lodged with the clerk of the district court. For that reason alone the court held that in returning the papers to the county court, the clerk was right. In the course of the opinion the court remarked that, unless the docket fee was paid and the case docketed within thirty days, no appeal was perfected, and no jurisdiction con-

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ferred upon the district court. That observation was *dictum*, for it was not necessary to the decision of the case, and would not be a precedent in that, or any other court, in a case where it became necessary to determine when an appeal is perfected. There is strong ground for holding, in accordance with many authorities, to which, as at present advised, we are inclined, that, under a statute like this, the jurisdiction of the appellate court attaches, and the appeal is perfected, when the appeal bond is filed and approved in the lower court, and the prescribed papers are lodged in the reviewing court, and that failure of appellant to follow up his appeal, as the statute requires, pertains to procedure, and is visited with the prescribed penalty. The formal docketing of the cause, it has been held, is not a condition precedent to vesting of jurisdiction, nor does a failure in that respect, divest jurisdiction of the appellate court."

The statute is not mandatory in requiring the clerk of the court to collect costs in advance, and it appears that the weight of authority is to the effect that he may waive such collection. The statute applicable here, reads:

"Clerks of courts of record may require in advance, on account of their fees, a deposit of five dollars, and no more at any one time, nor until the former deposit has been exhausted." Rev. Stat. 1908, § 2528.

The language, "may require in advance, on account of their fees a deposit of five dollars," seems to be permissive only and not mandatory. Plainly the sum is not in payment of any specific fee, but is a deposit on account of all fees in the case. It is a general statute and applies to all cases alike, and to all fees in all courts of record. We have seen from *Thomas v. Beattie, supra,* that such payment is not jurisdictional but is to be treated as penal in its nature, and for such reason, we must hold that while this deposit may be required as a condition precedent, yet such payment may be waived by express action of the clerk as in this case. The clerk kept an account with Judge Voorhees, the counsel in the case, and upon the filing of the transcript and approval of the bond, charged this fee to the account

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of counsel, who afterward paid it. This made the clerk liable on his official account for the fee, and was a substantial compliance with the statute.

In *Baldwin v. Liquor Dealers' Assn.*, 162 Mich. 703, 127 N. W. 784, it was held:

"Touching the second ground urged, we find from the affidavit of the register that, while the $5 fee was not in fact paid within the time limited by statute, the register considered it as paid, gave solicitors for defendants personal credit for the same, and made no demand therefor. The money was actually paid on June 13, 1910. These facts constitute a sufficient compliance with the statute."

And in *Harrison v. Palo Alto Co.*, 104 Ia. 383, the court said:

"Appellee further contends that the appeal has not been perfected, for the reason that the clerk's fees have not been paid or secured. It appears, however, that the clerk expressly waived this requirement. It is argued, however, that he cannot make such waiver. We think he may. But whether this is true or not the appeal should not be dismissed, for the reason that the clerk has performed all the duties required of him, and has certified the transcript of the record to this court. This is sufficient."

In *People, ex rel. v. Quinn*, 12 Colo. 473, 21 Pac. 488, it was said:

"The statutes make further provision for the protection of court and other officers by permitting them to collect their legal fees in advance; and if this right is not insisted upon at the proper time, the officer must be understood to have waived it, and to have consented that such fees shall abide the result of the suit."

To the same effect are *Short v. Cohen*, 11 Ga. 39; *Lyner v. Jackson*, 20 Ga. 773; *West v. Reynolds*, 94 N. C. 333. The court did not err in denying the motion to dismiss the appeal.

But the judgment must be reversed for the reason that it is not a judgment on the verdict, and not one that may be rendered in this action.

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The verdict of the jury is as follows:

"We the jury, find the issues herein joined for the plaintiff and against the defendant, W. I. Wigton, and that she is entitled to the possession of the property described in the complaint; we find the value of the property taken to be One Thousand Dollars and no hundredths cents ($1,000)."

This verdict was for possession only, with a finding as to value but the court erroneously rendered judgment as follows:

"That plaintiff do have and recover of and from the defendant the sum of one thousand dollars and costs of suit, and that execution issue therefor."

The verdict was primarily for possession of the property in suit, and the judgment should have followed the verdict in that respect, and for the value of the property in the event only, that recovery of the specific property may not be had.

There are other assignments of error but the record is so imperfect as relates to these that intelligent consideration is difficult if not impossible, and it may be that a new trial will obviate the necessity therefor.

The judgment is reversed and the cause remanded.

No. 9037.

CITY OF LOVELAND v. WESTERN LIGHT & POWER CO.

Decided January 7, 1918.

On motion of defendant in error to reinstate the cause on cross-assignments.

Motion Granted.

1. APPEAL AND ERROR—*Dismissal of writ of error—Effect on cross-assignments.* Under code sec. 420, S. L. 1911, p. 10, sec. 2, the voluntary dismissal of a writ of error, does not carry with it a dismissal of the cross-assignments of error.

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Messrs. PERSHING, TITSWORTH & FRY, Mr. AB. H. ROMANS, Mr. ROBERT G. BOSWORTH, for plaintiff in error.

Messrs. LEE & SHAW, Mr. E. E. WHITTED, for defendant in error.

En banc.

MR. JUSTICE GARRIGUES delivered the opinion of the court.

MOTION to reinstate the cause upon the cross-assignments of error.

Both sides filed exceptions below to the final judgment. Plaintiff in error, City of Loveland, sued out a writ of error and tendered to us a full record on error including the exceptions reserved and relied upon by defendant in error. Thereupon defendant in error filed cross-assignments of error. Upon motion of plaintiff in error, the writ of error was dismissed without reservation, saving the right of defendant in error to be heard upon its cross-assignments of error, defendant in error not consenting to the dismissal of the case pending on its cross-assignments of error.

Code section 420, Laws of 1911, p. 10, Sec. 2, provides:

"And the defendant in error who shall except to such final judgment may assign cross-errors in like manner on the record filed by the plaintiff in error, which cross-errors shall be heard, and decision rendered thereon, at the same time the case is considered on the other errors. Where the bill of exceptions preserved by either party contains the exceptions relied upon by the other party in his assignment of cross-errors, it shall not be necessary for such other party to preserve the same by a separate bill of exceptions."

The question is, did the voluntary dismissal of the writ of error by plaintiff in error, carry with it the dismissal of the cross-assignments of error made by their opponent and require defendant in error to sue out a new writ of error?

The code permits a defendant in error, in like manner as a plaintiff in error, to assign cross-errors on the record filed by the plaintiff in error. An assignment of error is in the nature of a complaint and a cross-assignment of error is

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equivalent to a cross complaint, cross-bill or counter-claim. Plaintiff in error could not, by dismissing the writ of error, prevent defendant in error from obtaining a review of the judgment upon its cross-assignments of error. *American Co. v. People,* 53 Colo. 512, 127 Pac. 941; *Patoka Township v. Hopkins,* 131 Ind. 142, 30 N. E. 896, 31 Am. St. Rep. 417; *Crane v. O. R. & N. Co.,* 66 Ore. 317, 133 Pac. 810; 6 Ency. Pl. & Pr. 848.

Motion to reinstate the cause of defendant in error on its cross-assignments of error, granted.

No. 8637.

HUNTER v. QUAINTANCE.

Decided July 2, 1917. Rehearing denied December 3, 1917.

Action for damages to an automobile. Judgment for plaintiff.

Reversed.

1. DAMAGES—*Pleading.* Alleged damages for the loss of the use of a pleasure automobile, being special in character, must be pleaded.

2. NEGLIGENCE—*Proof—Instructions.* When reliance is placed on particular acts of negligence, the proofs must be confined to those acts and the jury must be limited to a consideration of the specific acts charged.

Error to the District Court of Jefferson County, Hon. H. S. Class, Judge.

Mr. GERALD HUGHES, Mr. J. W. BARNES, for plaintiff in error.

Mr. REES D. REES, Mr. A. D. QUAINTANCE, for defendant in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

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THE defendant in error recovered a judgment against the plaintiff in error in an action for damages to an automobile, alleged to have been caused by negligence.

The complaint charged that the defendant and his servant "so carelessly and negligently drove and operated said Pierce Arrow automobile that, * * * by reason of said carelessness and negligence defendant's Pierce Arrow automobile struck and forced plaintiff's Oakland automobile off of the aforesaid highway and overturned, broke, wrecked and injured it, to plaintiff's damage in the sum of $800.00."

One witness for plaintiff, who was riding in plaintiff's car, testified that he heard the defendant's car strike plaintiff's car, and that he felt a jar; but none of the three other occupants of it gave any testimony to that effect. Plaintiff's brother, who was driving the car, testified that while he was going toward Golden, at 20 to 25 miles per hour, he saw a car with very bright and dazzling lights coming towards him, and that when it was about 10 feet from him, he turned his car to the right, and the defendant's car "shot between the two cars"; that his car skidded when it struck the soft part of the road, and turned over. He knew there was a car behind him when he began to turn out. He said, "My car was forced off the road by the car that passed me."

Another of the occupants testified that "after the Hunter car came in we waved a little, and turned over. As we were passing, Mr. Hunter's car cut in when we were almost abreast and went in front of us."

The other occupant testified that the plaintiff's car turned to the right as the Hunter car was passing; "the Hunter car came along side; something whizzed past us; the Hunter car was going faster." Evidence was received to show the cost of repairing the plaintiff's car, the value of its use for two months, and the deterioration of value after such an accident. The jury found for the plaintiff and assessed his damages at $515.00.

A motion for a new trial was overruled on condition that plaintiff remit $168.50 from the verdict. This sum having

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been remitted judgment for plaintiff was entered for $346.50.

It will be necessary to discuss only a part of the errors assigned, the first of which is that it was error to admit evidence on or submit to the jury the question of the plaintiff's damage by being deprived of the use of the car. It is urged that, the evidence showing that the car was used only for purposes of pleasure, there is no basis for estimating the damage from the loss of such use. Cases are cited which hold that the damage from such a source is too speculative to be considered. We are inclined to agree with that opinion.

But there is a more serious objection to the evidence on that point in the fact that damage from loss of use was not pleaded. Such damage is special and without the averment of the facts from which it is to be inferred, the defendant had no reason to be prepared to meet it. If it was to be included in the damages, it was important to determine not only how long the car was out of use, but whether or not the disuse for such a time was necessary. Clearly, the plaintiff could not in any event, recover for such a loss unless he showed that the repairs were made with reasonable promptness. On that question the defendant was entitled to notice and time for preparation, and that is the basis of the rule that special damages must be specially pleaded. The rule is too well established to require citation of authorities to support it.

It is also assigned as error that the question of negligence submitted to the jury was not confined to the act of negligence alleged in the complaint as the cause of the accident. This court is committed to the doctrine that when reliance is placed on particular acts of negligence the proofs must be confined to those acts. *Denver Cons. E. Co. v. Walters,* 39 Colo. 301, 89 Pac. 815. This rule also is based upon the just requirement that the defendant be not called upon to defend on a charge of which he has no notice. He may properly conclude that the case will not involve his acts other than those charged to have caused the injury.

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It follows, of course, that the jury must be limited to the consideration of the specific acts charged. Instruction No. 3, violates this rule. It reads:

"The court instructs the jury that if you believed from the evidence the injuries complained of were caused by the negligence or carelessness of the servant or chauffeur of Hunter in the course of his employment, either with or without negligence or fault on the part of the driver of Quaintance's automobile, or without any such negligence on his part as contributed to the injuries complained of, or with no want of such care and skill on his part as could reasonably be expected of a man of ordinary prudence and skill in such a situation, then you must find for Quaintance."

This left the jury at liberty to find, if they saw fit, that the injury resulted from any act of defendant which they thought was negligent. Possibly they found that defendant was negligent in coming up so fast without warning; or that the injury was caused by defendant's car cutting in ahead of plaintiff's car. The giving of that instruction was error.

Counsel contend that there was error in the admission of evidence, and in the overruling of the motion for a new trial on condition that plaintiff remit nearly one-third of the damages fixed by the verdict.

If there were error in these matters it may not occur again on another trial, and as the judgment must be reversed for the reasons above given, those assignments need not be considered.

The judgment is reversed, with leave to either party to amend as he may be advised.

Chief Justice White and Mr. Justice Garrigues dissent.

GARRIGUES, J., dissenting. I cannot agree with the majority opinion.

The evidence shows that the Quaintance car, a 40 horse power Oakland, had been in use only nine months, was in good condition, and cost $2,050. It was going west toward Golden at night on a traveled roadway 16 feet wide, with

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soft banks or irrigating ditches on each side, and met a car coming in the opposite direction, toward Denver. At this time, the Hunter car, a 60 horse power Pierce-Arrow, was coming at a very high rate of speed behind the Quaintance car. Just as the two cars met, the Hunter car, without giving any signal or warning and going at the rate of 50 miles an hour, attempted to pass and did pass the Quaintance car diagonally between the two cars, in front of the Quaintance car and either striking or pinching it, forced it off the road. Whether actually struck or not, it was in fact forced or pinched off by the Hunter car and somersaulted, coming down in an irrigating ditch. The car was wrecked, wheels broken, fenders bent and injured, body split and broken, top torn off body, radiator, lamps and windshield smashed, and engine racked and thrown out of alignment, completely demolishing the car. The actual cost of repairing it, about which there is no dispute or question of any kind, and which was paid, was $324.20, and the undisputed evidence shows that the depreciation of the car was from $100 to $150. The court entered judgment for $346.50, or $22.30 more than the actual outlay in having the car repaired.

The driver of the Quaintance car testified:

"Hunter's car forced my car off the hard beaten road and onto the soft, sandy, sloping bank. It skidded a second and then turned completely over, turning a somersault. I was on the extreme right of the hard beaten road and when the Hunter car shot in ahead of me, it forced or pinched me off the road."

Another witness testified:

"In shooting in between us in such a fashion, the back part of the Hunter car struck our car. The noise was clearly audible to me in the back seat. I felt a sudden jar. The car swerved and skidded for a second and then turned completely over and lit in the irrigation ditch. The contact between the Hunter car and ours was distinctly audible. But for the Hunter car shooting in between us and

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striking and forcing us off the road, the accident would not have happened."

Another witness testified:

"Cregar (the driver of the Quaintance car) kept on the right-hand side of the road, and just as we were about to meet the car coming from Golden, the Hunter car whizzed right by my ear, right between the car coming from Golden and our car, and that's the last I remember until I found myself lying on the ground beside the machine."

Another witness testified:

"There was not room enough for three such cars to pass on the road where the accident happened."

Another witness testified:

"Just as we were about to meet the car coming from Golden, Hunter's car, which was behind us, shot past us on our left and between us and the machine coming from Golden. The three machines were almost abreast."

The court instructed the jury:

Instruction No. 1.

"The court instructs the jury that this is an action brought by plaintiff, Charles F. Quaintance, to recover $800 from the defendant, A. V. Hunter, for damages alleged to have been sustained by the said Quaintance through injuries to his 40 horse power Oakland automobile, on the evening of August 31, 1911, which damages said Quaintance alleges were occasioned by the fault, negligence, and carelessness of said Hunter's chauffeur in operating said Hunter's 60 horse power Pierce-Arrow automobile in such a manner as to strike and force said Quaintance's automobile off of the highway, thereby causing it to be overturned and damaged."

Instruction No. 3.

"The court instructs the jury that if you believe from the evidence the injuries complained of were caused by the negligence or carelessness of the servant or chauffeur of

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Hunter, in the course of his employment as such servant or chauffeur, either without any negligence or fault on the part of the driver of Quaintance's automobile, or without any such fault or negligence on his part as contributed to the injuries complained of, or with no want of such care and skill on his part as could reasonably be expected of a man of ordinary prudence and skill in such a situation, then you must find for said Quaintance."

Instruction No. 8.

"If the jury believe from a preponderance of all the evidence in this case that defendant, by any act or acts of negligence with which he is charged, as explained in these instructions, and without fault on the part of the driver of plaintiff's automobile, struck and forced the driver of plaintiff's automobile to run such automobile off of the aforesaid highway, and that the same resulted in overturning, breaking, and injuring said auto, then the jury should find the defendant guilty and assess the plaintiff's damages at such sum, not exceeding $800, as they may believe, from all the evidence, he has sustained."

Instruction No. 10.

"The court instructs you that it is the duty of a person operating an automobile on a highway to move it at such a rate of speed as is reasonable under the circumstances, and so as not to endanger others in the enjoyment of such highway. He is bound to anticipate that he may meet or overtake others at any point on the highway and he must keep a proper lookout for such others and keep his machine under such control as will enable him to avoid a collision with or injury to others, in the observance likewise of proper care and caution on their part, and, if necessary, he must slow up and even stop his auto to accomplish such ends."

Instruction No. 12.

"The court instructs the jury that if you believe from the preponderance of the evidence that Hunter or his chauf-

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feur, by negligently attempting to pass Quaintance's automobile, if you so find that he was negligent in said respect, placed said automobile in a position of imminent peril, Hunter cannot complain if the driver of Quaintance's automobile committed an error of judgment, if you find he did so commit the same, in not instantaneously choosing the best course to pursue, in which event the error in judgment cannot, in law, be imputed to him as contributory negligence."

Instruction No. 13.

"The jury is instructed that the ground of plaintiff's suit against the defendant is negligence, and that negligence is not to be presumed by you from the mere fact that this accident occurred but it must be established by the plaintiff by what is known as a preponderance of evidence."

Instruction No. 14.

"The court instructs the jury that plaintiff's complaint and right to recover anything against the defendant is based upon the specific allegation that 'by reason of said carelessness and negligence, defendant's Pierce-Arrow automobile struck and forced plaintiff's Oakland automobile off the aforesaid highway'; and the burden of proving this particular allegation is upon the plaintiff, and unless you find from a preponderance of the evidence that defendant's said automobile did strike and force plaintiff's said automobile off said highway so as to cause the injury complained of, 'by reason of said carelessness and negligence,' then your verdict must be for the defendant."

Instruction No. 15.

"In order to entitle the plaintiff to a verdict against the defendant, plaintiff must show, and you must find, by a preponderance of the evidence, that the defendant was guilty of negligence, that is, want of care, as explained in these instructions and you must further find by such preponderance of the evidence that the negligence was the

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proximate cause, that is, the direct and not the remote cause of the injury."

Instruction No. 17.

"The court instructs the jury that the correct measure of damage in this case is the reasonable cost of repairing said Quaintance's automobile in order to put it in as good condition as it was in before the injury complained of, plus any depreciation in the value of said Quaintance's automobile, by reason of said injury, if any, plus any direct loss the said Quaintance may have sustained by reason of the loss of the use of said automobile during a reasonable length of time for its repair, but in no case an amount in the aggregate exceeding $800, the amount prayed for in the complaint."

The instructions contain a statement of the basis of the cause of action, and the specific grounds of negligence which plaintiff must establish from the evidence to recover. Instruction 3, upon which the case is reversed, was not given to the jury as a statement of the basis of the cause of action or the ground of recovery, but to explain the principle that Hunter would be responsible for the negligence of his driver and could not escape the charge of negligence because some one else was driving the machine. The jury were thoroughly instructed as to the specific grounds of negligence and distinctly told what plaintiff must prove before he could recover. Merely because in explaining that Hunter was liable for the acts of his driver, the general term negligence was used instead of specifying again the grounds of negligence, did not mislead the jury. They were properly instructed once as to the specific grounds of negligence, and it was not necessary to repeat these grounds every time the word negligence was used.

The roadbed was but 16 feet wide, and as the two cars met, going in opposite directions, the driver of the Hunter car shot in between them and attempted to pass and did pass the Quaintance car at an unusual and dangerous rate of speed. There is plenty of evidence, which the jury must

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have believed, that by doing so it struck and forced the Quaintance car out of the road. But if the Hunter car did not strike the other car, if it simply cut in ahead at a speed of 50 miles an hour, or a dangerous rate of speed, and forced or pinched the other car out of the road, he would be liable, and there would be no material variance between the pleadings and evidence. The complaint alleged that the car was struck and forced off the road. This was an allegation that it was forced off the road as well as struck, and whether it was struck or not is immaterial. Defendant could not have been prejudiced on the trial by failure to prove that his car struck as well as forced the other car off the road into the ditch. But why discuss this, when the evidence shows it was struck as well as forced off the road.

The reasonable value paid for repairing the car was to all intents and purposes a liquidated amount. So far as the amount is concerned, it was not disputed or questioned by anybody. The controversy was over any liability whatever. It seems reasonable that a car could not be wrecked and repaired like this one without depreciation in value, and there was abundant testimony that the depreciation was from $100 to $150. It must not be forgotten that this car had only been in use a short time, was in good condition, and cost over $2,000. The judgment entered was for $346.50, from which deducting the liquidated damages of $324.20, leaves $22.30, and on account of this it is held the judgment should be reversed. Defendant cannot complain because the $22.30 is a less amount than the depreciation to the car as shown by the evidence.

Moreover, I think plaintiff was entitled to recover for the use of the car for the time reasonably occupied in its repair. This machine was not kept for pleasure; it was kept for family purposes, and had been driven on an average of only 15 miles per day.

The automobile has passed the pleasure stage, simply and has come to stay, not merely as a pleasure vehicle, but as a necessity in our business life. It is seldom that a horse is now seen on the streets of our cities, and already farm-

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ers are bringing in their chickens, butter, and eggs to the market in autos. I cannot see why depriving the owner of the use of his machine is not as actionable as depriving one of the use of a cow, a horse, or a wagon. Anyhow, this matter of $22.30 could be easily adjusted without reversing the case and ordering a new trial, plaintiff offering in open court on oral argument to remit all of the judgment except the $324.20, about which amount there is no dispute, save that defendant denied any liability whatever, and upon this the jury found against him.

Courts of review do not now make a practice of reversing cases unless it is clearly established that some error was committed on the trial which prejudiced the substantial rights of one of the parties, and I am sure the record in this case discloses no such error.

I am authorized to state that Chief Justice White concurs in this dissenting opinion.

No. 9167.

SEILER, ET AL. v. THE FARMERS' LIFE INSURANCE CO., ET AL.

Decided July 2, 1917. Rehearing denied October 8, 1917.

Affirmed.

On Application for Supersedeas.

Error to the District Court of Delta County, Hon. Thomas J. Black, Judge.

Messrs. QUAINTANCE, KING & QUAINTANCE, for plaintiffs in error.

Mr. E. M. SABIN, for defendants in error.

En banc.

MR. JUSTICE HILL delivered the opinion of the court.

Upon a careful inspection of this record and a thorough consideration of the briefs in connection therewith, we are

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of opinion, not only that no prejudicial error has been committed, but that substantial justice will follow the enforcement of the decree. For these reasons, the application for supersedeas will be denied and the judgment affirmed.

Mr. Justice Allen not participating.

No. 8668.

ZOLLINGER, ET AL. v. VALDERIN (HOOD, ADMR.).

Decided October 8, 1917. Rehearing denied December 3, 1917.

Motion in district court to dismiss appeal from county court for alleged failure to file appeal bond in time. Motion sustained.

Reversed.

1. APPEAL BOND—*Presumption.* A motion was made to dismiss an appeal on the ground that the bond had not been filed within time. As to whether further time had been asked or granted, the record was silent. *Held*, that the bond having been filed and approved, the appellate court must presume the filing and approval to be regular in all respects in the absence of an affirmative showing to the contrary.

2. MOTION—*Showing.* An unverified motion, not supported by affidavit is in no sense such an affirmative showing as is required to rebut the presumption of regularity of court proceedings.

Error to the District Court of Douglas County, Hon. J. W. Sheafor, Judge.

Messrs. HILLIARD, LILYARD & FINNICUM, Mr. JOHN D. MILLIKEN, for plaintiffs in error.

Mr. C. M. DEARDORFF, Mr. HARVEY RIDDELL, for defendant in error.

MR. JUSTICE BAILEY delivered the opinion of the court.

PLAINTIFF in error seeks to review an order of the district court dismissing an appeal from the county court from

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a decree refusing probate of a will. The instrument was rejected on the 5th of February, 1915, and twenty days allowed for filing an appeal bond. Bond was filed on the 23rd, which was disapproved two days later. Fifteen days further time was allowed, and another bond was filed on the last day of the extended time. Objections were made to this bond, also, and it was disapproved on March 27th. On the same day another bond was filed, which was approved on April 1st, 1915.

In a motion filed in the district court it is contended in substance by defendant in error that no extension of time after March 12th, 1915, was allowed by the county court, that no notice was given or received of any such extension, that no such extension had been asked for by plaintiffs in error, and that, therefore, the bond as approved by the county court was of no validity to perfect an appeal. The motion was sustained, and the appeal dismissed. It is that order which is now here for review.

Several questions are raised by contestants, but the fundamental issue is whether the last bond offered, which was approved April 1st, was presented and approved in conformity with the statute. The record shows that the fifteen days additional time allowed by the court had expired when the bond in question was filed. As to whether further time was asked for or allowed the record is silent. Such additional time was absolutely essential in order to allow the bond to be filed and give the court jurisdiction to approve it. The presumption arises that, as the court did approve the bond, that such act was lawful and regular in all respects. It is to be presumed that the acts and proceedings of courts of record are regular and free from error, unless the contrary affirmatively appears upon the face of the record. *German Nat. Bank v. Elwood,* 16 Colo. 244, 27 Pac. 705.

In *Wilson v. The People,* 3 Colo. 325, this court, in discussing the presumption of regularity which attaches to all official acts of the court, said at page 328:

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"Every reasonable intendment must be made in favor of the regularity of the record. The record asserts that the grand jury of twelve men were selected and chosen according to law, but as to the particular manner of selecting them it does not speak. We are not permitted to presume, in the silence of the record, that the court adopted an illegal method in convening the grand jury."

In this case the record shows the filing and approval of the bond in question. We must presume that such filing and approval were regular, and according to the statute, unless affirmative showing is made to the contrary. *National Bank v. Elwood, supra.* There is no affirmative showing in this case that further time was not granted according to law, and in the absence of such showing the presumption becomes conclusive as to the regularity of the proceedings in the lower court. *Christ v. People,* 3 Colo. 394; *Taub v. McClelland,* 10 Colo. App. 190, 51 Pac. 168; *Reeves v. Best,* 13 Colo. App. 225, 56 Pac. 985; *Giano v. People,* 30 Colo. 20, 69 Pac. 504; *East Denver District v. Altura Co.,* 60 Colo. 452, 154 Pac. 100.

The motion of defendant in error in the district court, upon which the dismissal of the appeal is based, was in no sense such an affirmative showing as is required to rebut the presumption of the regularity of the proceedings of the county court. The motion was unverified and unsupported by affidavits, and as evidence of its own contents is worthless. The judgment of the district court dismissing the appeal will therefore be reversed, and the cause remanded for trial upon its merits.

No. 8703.

FEARNLEY, ET AL., v. HAINES, ET AL., EXECUTORS.

Decided October 8, 1917. Rehearing denied December 3, 1917.

Action to enjoin the reconstruction of an irrigating ditch across lands of plaintiffs. Judgment for plaintiffs.

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Reversed.

1. IRRIGATION—*Ditch right of way.* Where a ditch owner is permitted without interference to construct a ditch over the land of another and the ditch is put in use, a right of way is thereby acquired and the necessity for condemning to obtain possession is obviated.

Error to the District Court of Jefferson County, Hon. H. S. Class, Judge.

Mr. GEORGE F. DUNKLEE, Mr. EDWARD V. DUNKLEE, Mr. O. E. JACKSON, Mr. ALLEN C. PHELPS, Mr. CHARLES H. SMALL, for plaintiffs in error.

Messrs. CRUMP & ALLEN, for defendants in error.

En banc.

MR. JUSTICE GARRIGUES delivered the opinion of the court.

THE FEARNLEY-HAINES ditch, land and water troubles have been here several times before. See *Rollins v. Fearnley,* 45 Colo. 319, 101 Pac. 345; *Haines v. Fearnley,* 51 Colo. 317, 117 Pac. 162; *Haines v. Fearnley,* 56 Colo. 243, 138 Pac. 541. These cases throw some light on the present controversy.

Haines and others, as executors, trustees and beneficiaries of the estate of Julia Merritt, brought this action in the district court against Joshua Fearnley and the Fearnley Investment Company, plaintiffs in error, to restrain them from reconstructing a ditch across a tract of land belonging to the estate. A trial to the court resulted in a judgment for plaintiffs, to review which, the case is brought here on error.

The only question involved is whether there was a right of way obtained across the premises for the irrigating ditch, the contention of plaintiffs in error being that the evidence does not support the judgment.

The following facts are uncontroverted: The ditch was constructed in 1880 for carrying water for irrigation across the premises; it had no deeded right of way, and what per-

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mission, if any, was originally obtained from the owner, to go across the land, is not disclosed; the property then was vacant and unoccupied, and there appears to have been no objection from any source, at least none is shown, to the construction of the ditch; it was used for carrying water for irrigation from 1881 to 1889 inclusive, and thereafter at longer or shorter intervals; there being long periods when it was not used and out of repair, and then it would be cleaned out, repaired and again used to carry water as formerly; from the date of construction in 1880 down to 1907 when it was plowed up and destroyed by the owner of the premises, it was in evidence on the ground, plainly discernible and used whenever the occupants of the Fearnley ranch desired; Julia Merritt purchased the premises in 1897, and not only was the ditch then in existence on the land, but in the deed conveying it to her, was a clause reciting that the property was "subject to all rights of way and easements for ditches, reservoirs and irrigation purposes either recorded or appearing on the surface"; as stated, in 1907, the tenants on the Merritt ranch plowed up and destroyed the ditch and it was not until 1911, that the Fearnley people attempted to reconstruct it, when this action was instituted.

We are not concerned with the amount of available water nor the source of supply for the ditch. Neither are we confronted with any question of non-user, or abandonment of the right of way, as there is nothing in the pleadings or proof touching on that question. The issue is confined to the single proposition as to whether or not a right of way was acquired.

Defendants in error contend that the Fearnley people failed to prove any license, grant, permit, or conveyance under which the ditch was originally constructed, and that there had not been a continuous use of the ditch for 20 years; in other words, that no right of way was obtained by gift, purchase or condemnation, and that its acquisition cannot be predicated upon the doctrine of prescription for the reason that the easement was not continuously enjoyed,

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without interruption, for twenty years. The court adopted these latter views and rendered judgment accordingly. In doing so, it must clearly have misapprehended the law applicable in this jurisdiction to the acquisition of rights of way for irrigation ditches. We have announced the rule many times governing this subject and it seems unnecessary at this time to more than reiterate the doctrine, "That where a ditch owner is permitted without interference to construct a ditch over the land of another and the ditch is put in use, a right of way is thereby acquired and the necessity for condemning to obtain possession is obviated." *Rogers v. Lower Creek Ditch Co.*, 63 Colo. 216, 165 Pac. 248.

The judgment is reversed and the cause remanded with directions to dismiss the action.

No. 8731.

BOAZ v. ORDER OF COMMERCIAL TRAVELERS OF AMERICA.

Decided October 8, 1917. Rehearing denied December 3, 1917.

Action by beneficiary named in a fraternal benefit society certificate to recover upon the death of the insured. Judgment for plaintiff was reversed by the court of appeals, which was reversed by the supreme court and the judgment of the district court,

Affirmed.

1. INSURANCE—*Fraternal Benefit Society Certificate—Waiver of Notice.* When the insurer says nothing of breach of the condition as to notice, and furnishes blanks for proof of death, etc., the claimant under a policy is entitled to infer that the question of payment is to be determined on its merits.

2. *Insurance Policy—Construction.* Having indemnity for its object, a policy of insurance is to be construed liberally to that end, and for this reason conditions and provisos therein will be strictly construed against the insurer.

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3. APPEAL AND ERROR—*Evidence.* In an action on a life insurance policy, evidence of waiver of notice is to be regarded in a light as favorable to plaintiff as is reasonable.

Error to the Court of Appeals.

Mr. CHARLES A. MURRAY, for plaintiff in error.

Mr. ARCHIBALD A. LEE, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

THE husband of plaintiff in error, at the time of his death on March 26, 1913, was a member of the defendant in error, a fraternal benefit society, under a certificate in the nature of an insurance policy, in which plaintiff in error was named as the beneficiary.

The by-laws of the order required notice of death to be given within ten days, but in this case the notice, mailed April 3, 1913, having been addressed to Chicago, instead of Columbus, Ohio, did not reach the office of the order until nineteen days after the death of Boaz.

The parties will be hereinafter designated as they stood in the trial court.

The defendant, on April 15, 1913, on request of the plaintiff, sent her blanks for making proof of death, and there was on said blanks the following indorsement:

"In sending this blank this order does not waive any provisions of the constitution, but expressly reserves the same."

It appears that said indorsement is in accordance with an express provision of the constitution that sending blanks or investigating a claim shall not constitute a waiver of any defense to such claim.

On April 25, 1913, proof of death was forwarded to the defendant and received and retained.

In the letter transmitting said proof, plaintiff requested that other blanks be forwarded if necessary.

On May 12, plaintiff, through her attorneys, wrote defendant stating that no reply had been received to the

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letter sent with proof of death, and asking that plaintiff be advised of defendant's conclusions in the matter.

On July 7, defendant sent plaintiff another blank, and informed her that she might answer the questions propounded in the blank. Both letter and blank contained a statement that no rights were waived.

On July 14, plaintiff sent defendant the additional proof made in accordance with the second blank sent her, and requested that a copy of the application on which the certificate was issued be sent to her.

The copy was sent with a letter saying that it was sent "as an accommodation only."

July 25, plaintiff's attorneys wrote defendant calling attention to the fact that no indication had been given of an intention to settle the claim, in consequence of which they had been directed to take the steps necessary to collect it.

Three days later defendant wrote them that plaintiff had no right of action until the claim had been disallowed, and that undoubtedly it would be rejected.

Thereupon an action was begun on the certificate. Defendant in its answer alleged that the deceased had been intoxicated at and for some time prior to the date of his death, and, further, that he committed suicide, in either of which cases, there was no liability. It also alleged that notice of death was not given within the time required by the constitution of the order.

The replication denied the intoxication and suicide, and set out the sending of blanks, etc., as above recited, all without notice of objection on account of want of notice within the time, and alleged that the condition as to notice had been waived.

The plaintiff had judgment, and the case was brought up on error, and sent to the Court of Appeals. The judgment was there reversed, two of the judges dissenting, and one concurring specially. In his concurring opinion he stated that he recognized that this case comes under the rule laid down in *Insurance Co. v. Allis Company*, 11 Colo. App.

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264, 53 Pac. 242, supporting the defense of waiver, but that his judgment did not approve that ruling.

It appears, therefore, that the reversal of the judgment according to the views of the majority of the judges, was contrary to the law as heretofore laid down by that court; yet the case mentioned was not overruled; indeed, there is no reference to it in the majority opinion.

If the reply of waiver is good, the reversal of the judgment was error.

The other defenses were determined by the verdict.

There is in the briefs an extended discussion of waiver by pleading other defenses than that of want of notice together with the latter defense.

We do not consider it necessary to determine that question in this case.

If there was a waiver in fact, it was by the conduct of the defendant before the suit was begun. We are to determine whether or not the acts relied upon as constituting a waiver do, in law, relieve the plaintiff of the contract duty to give the prescribed notice.

In *Hartford F. I. Co. v. Hammond,* 41 Colo. 323, 92 Pac. 686, this court quoted from *Hartford Ins. Co. v. Smith,* 3 Colo. 425, as follows:

"There must be a substantial compliance with the terms of the policy in furnishing the preliminary proofs before the assured is entitled to any indemnity in the case of loss, unless the company waived the defects in the proofs or waived the proofs altogether by putting a refusal to pay on other grounds;" and adds: "The refusal to pay in this case was not because of the absence of this statement or proof of loss, but because it was contended that the insured over-estimated the amount of his loss, and, having based the refusal upon grounds other than the absence of the preliminary proof, it is well settled that that objection was waived. *Atlantic Ins. Co. v. Manning,* 3 Colo. 224; *Lampkin v. Travelers Ins. Co.,* 11 Colo. App. 249; *Helvetia Ins. Co. v. Allis Co.,* 11 Colo. App. 264, and other authorities cited in cases herein referred to."

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The same rule is laid down in *Cal. Ins. Co. v. Gracey*, 15 Colo. 70, 24 Pac. 577, 22 Am. St. Rep. 376, and it is approved and followed in the courts of other states.

It is urged, however, that in this case the rule has no application because of the reservations indorsed on the blanks, etc. To this we cannot agree.

The doctrine of waiver is based upon the manifest injustice of permitting a party by his acts to mislead another, so that the latter is induced to assume the expense and labor of the trial of an issue tendered, and then be met with the plea that because of something done, or omitted to be done, of which the first party all the time had knowledge, such issue is wholly immaterial.

The rule requires that a party intending to rely upon want of notice should, in fairness, so state, and thus leave the other party to pursue such a course as he may deem fit under the circumstances.

When nothing is said of breach of the condition as to notice, and blanks are furnished for proof of death, etc., the claimant under a policy is entitled to infer that the question of payment is to be determined on its merits. Otherwise we must suppose that the insurer is permitting the claimant to incur expenses for that which is of no value.

The reservation that provisions in the constitution are not waived, is not notice that the insurer is acting in bad faith, in failing to state that it intends to defend on want of timely notice, though that may be only one of several defenses.

This reservation must be construed in connection with all the circumstances surrounding it. If an inference of an intent to waive the presented notice may reasonably be drawn from the circumstances, including the indorsements on the blanks, that is sufficient. A reservation in terms so general does not necessarily negative an intent as to one of the many provisions of the constitution to which it may possibly apply; and, if the reservation is in conflict with the acts of the party, it will properly be regarded as not showing an intent different from that evidenced by conduct.

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The reservation in this case is general; the acts are specific; and they cannot be held to control.

In *Jennings v. Bro. Acc'd. Co.*, 44 Colo. 68, 96 Pac. 984, 18 L. R. A. (N. S.) 109, 130 Am. St. Rep. 109, we said:

"Having indemnity for its object, a policy of insurance is to be construed liberally to that end, and for this reason conditions and provisos therein will be strictly construed against the insurers, because their object is to limit the scope and defeat the purpose of the principal contract."

We see no reason why the same rule should not apply in determining what inferences should be drawn from the conduct of the defendant in this case.

The plaintiff is entitled to have the evidence of waiver regarded in a light as favorable to her as is reasonable. So considered,—or even without a liberal view of it,—it will sustain a finding of waiver of the defect in the notice.

That being so, the Court of Appeals erred in reversing the District Court. The judgment is therefore reversed, and the cause remanded to the District Court, whose judgment stands affirmed.

Chief Justice White dissenting. Mr. Justice Allen not participating.

No. 8749.

THE DURANGO TRUST CO., EX'T'R OF STRAWN v. CAMPBELL.

Decided October 8, 1917. Rehearing denied December 3, 1917.

Action for contribution by surety against co-surety on a promissory note. Judgment for defendant.

Affirmed.

1. CONTRIBUTION—*Sureties on Promissory Note.* A surety who claims contribution because he has paid the common obligation, can not recover against the co-surety if the payment so made was under and in consideration of an independent agreement between the principal and surety so paying.

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2. REAL PROPERTY—*Unacknowledged Deed.* An executed, but unacknowledged deed, if delivered, is sufficient to pass title.

Delivery of Deed—What Constitutes. The very essence of the delivery of a deed is the intention of the parties, which is to be gathered from their conduct and the surrounding circumstances.

Error to the District Court of La Plata County, Hon. W. N. Searcy, Judge.

Messrs. PERKINS & MAIN, for plaintiffs in error.

No appearance for defendant in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

PLAINTIFF and defendant below were co-sureties upon a note for $1,000.00, of which one Whitney was the maker. Shortly before the note was due Whitney notified plaintiff, Strawn, that he would not be able to pay the note at maturity, and offered to deed to Strawn certain land in return for which Strawn was to discharge the note, sell the land, reimburse himself, clear the land of a certain incumbrance and turn over the surplus, if any, to Whitney. Later it appears that Strawn determined to take the land himself, but the testimony is in conflict as to whether the terms of this transaction were agreed to by Whitney. Strawn paid the note, however, and later took possession of the land and put in a crop. A deed was executed by Whitney, though not acknowledged, nor did it set out the incumbrance upon the land. The testimony is conflicting as to whether the deed was delivered. It was never recorded, but a tax schedule prepared by the proper county officer, dated some six weeks after the deed was signed by Whitney, lists the land described therein as the property of Strawn, who later paid part of the taxes.

Some time after Strawn took possession of the land a flood washed out his entire crop and greatly diminished, if not entirely destroyed, the value of the tract for agricultural purposes. It was after this freshet that suit was

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brought to compel contribution. Judgment was entered for defendant, and plaintiff brings the cause here for review on error.

The errors assigned are to the giving of certain instructions, the refusal to give others in their stead, and the insufficiency of the verdict. It is urged that, although defendant's answer alleged a sale by Whitney to plaintiff, the court admitted evidence tending to show negotiations for a sale only, and in effect told the jury that such evidence would support the defense. It is also contended that the court in effect instructed the jury that if negotiations were had in accordance with which Strawn agreed to pay the note, and the incumbrance on the land, in exchange for the land, that the defendant was released even though the land was encumbered for more than represented, and although the minds of the parties to the contract of purchase were never in full agreement.

The instruction containing these alleged errors is as follows:

"Instruction No. 5. The court further instructs you that if you find from a preponderance of the evidence in this case that the plaintiff Strawn and said maker of the note, Whitney, entered into an agreement, either orally or in writing, prior to the time of the payment of the said note by Strawn, under which agreement the said Whitney was to convey to said Strawn certain lands by a sufficient deed of conveyance, and subject only to the Riggle mortgage, and that as consideration or part of the purchase price for said lands that the said Strawn, amongst other things, thereunder agreed to pay the said Whitney note in question, and that under said agreement the said Strawn entered into possession of said land as an owner thereof, and voluntarily paid said note as a part of the purchase price for said lands, and not merely because of his obligation as surety, then your verdict should be for the defendant, even though the said Whitney may have thereafter failed to execute and deliver a sufficient deed of conveyance, or to clear the land of a second trust deed. In such case the remedy of the

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plaintiff for any failure on the part of said Whitney would be against said Whitney and not against said Campbell."

Upon the facts shown by the record the above instruction correctly states the law. It is elementary that a surety who claims contribution because he has paid the common obligation cannot recover against the co-surety if the payment so made was under and in consideration of an independent agreement between the principal and the surety so paying. There can be no dispute that Strawn paid the Whitney note as part of the purchase price of the land covered by Whitney's executed but unacknowledged deed. Such a deed, if delivered, is sufficient to pass title. *Knight v. Lawrence,* 19 Colo. 434, 36 Pac. 242. It is contended, however, that no delivery was made. It seems that the instrument was never permanently in Strawn's possession, but the disposition made of it by the parties may well have been considered a delivery in law. In *Brinker v. Malloy,* 53 Colo. 186, (125 Pac. 507), this court, at page 189 held: "The very essence of the delivery of a deed is the intention of the parties, which is to be gathered from their conduct and all the surrounding circumstances." In the instant case Whitney executed the deed and left it with the scrivener. Strawn, after discovering that it had not been acknowledged, left it in the same hands, presumably until it had been formally acknowledged. There was also some objection to it on Strawn's part because the trust deed covering the property had not been set out in the deed. In the meantime, however, he entered into possession of the land, permitted it to be assessed to him, paid taxes on it, planted a crop, and exercised other acts of ownership. Not until the flood materially lessened its value did he attempt to repudiate the transaction.

He then alleged that there was a second trust deed on the land, about which he knew nothing at the time of making the agreement with Whitney, and for that, and other reasons, the minds of the parties had not met, and that therefore there was no sale or purchase of the land.

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It appears that there was such second trust deed, for $500.00; it also appears that there was a chattel mortgage between the same parties, for the same sum, and to secure the same note, and there is testimony to the effect that a considerable amount of this indebtedness was paid by Whitney, and that he was ready and able to pay the remainder. He also testifies that he was and is ready to execute another deed for the land according to agreement.

In any event it is manifest by the record, that Strawn as co-surety paid the obligation of his principal not by reason of his obligation as such surety, but in consideration of an independent agreement with Whitney for his own benefit. The judgment of the trial court will be affirmed.

No. 8819.

THE AULTMAN-TAYLOR MACHINERY CO. v. FORREST.

Decided October 8, 1917. Rehearing denied December 3, 1917.

Action to recover balance due on promissory note after application of amount received from sale of chattel security. Judgment for defendant.

Affirmed.

1. CHATTEL MORTGAGE—*Sale of Property—Evidence of value.* Evidence of the amount mortgaged property sold for at a private sale in May, 1903, was properly excluded from the consideration of the jury, when offered to prove value of the property as of October 24, 1902, the date of the sale under the mortgage.

2. PLEADINGS—*Variance.* Where plaintiff alleges the amount received at a public sale of property under a chattel mortgage, he will not be permitted to prove the amount obtained at a subsequent private sale which was not pleaded.

3. APPEAL AND ERROR—*Findings of Fact.* Findings of a jury, justified by the evidence, will not be disturbed on review.

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Error to the District Court of La Plata County, Hon. W. N. Searcy, Judge.

Messrs. PERKINS & MAIN, for plaintiff in error.

Messrs. RUSSELL & REESE, for defendant in error.

En banc.

MR. JUSTICE SCOTT delivered the opinion of the court.

THIS action is to recover on five promissory notes in the aggregate sum of $650.00 executed and delivered by the defendant in error, defendant below, to the plaintiff in error, plaintiff below, on the 20th day of July, 1901, secured by a chattel mortgage on a threshing machine engine. The notes and mortgage were executed within the state of Kansas, where the defendant then resided. The case upon a former trial was before the Court of Appeals, reported in 23 Colo. App. 558, 130 Pac. 1086.

The judgment of the trial court in favor of the defendant was reversed by the Court of Appeals and a new trial directed, with permission to the parties to amend their pleadings as they may be advised. Upon the present trial the plaintiff relied upon its original pleadings.

The defendant upon the first trial set up several separate defenses, the only one considered, being the allegation that the notes were executed in part payment for a threshing machine engine, the purchase price of which was $1,200.00, the execution of the chattel mortgage, the sale of the property thereunder by the plaintiff, and the realization from such sale of a sufficient sum to pay the notes and interest, and that thereby the notes were fully paid and discharged.

The replication admitted the taking of the property and sale under the chattel mortgage. The proof disclosed that the plaintiff took possession of the engine under the chattel mortgage and advertised and sold the same at public sale for the sum of fifty dollars; the plaintiff being the purchaser. The plaintiff deducted $20.65 for expenses of sale and credited the remainder, $29.35 on the notes.

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For reasons stated in the opinion, the Court of Appeals held this chattel mortgage sale to be void, and that the sum to be properly credited to the defendant on the notes should be the reasonable or market value of the engine at the time and place of sale. Upon this point the court said:

"Inasmuch as the statute does not forbid a sale under conditions provided in a chattel mortgage, the public sale should have been made upon the notice provided in the chattel mortgage, to-wit, fifteen days. *Denny v. Van Dusen,* 27 Kan. 437; *Reynolds v. Thomas,* 28 Kan. 810. For failure to give due notice the sale was not good as a public sale under the conditions of the mortgage; and while the mortgage also provides that the property may be disposed of at private sale, with or without notice, and that at any sale the mortgagee may become the purchaser of the property, the attempted sale was not private. And both upon reason and authority we think the bid at such sale without due notice should not be held to measure the amount for which the defendant should have credit upon the notes; but that he would be entitled to credit for the reasonable value of the said engine, which would be the market value thereof at the time and place of sale. Jones on Chattel Mortgages, § 793; *Waite v. Dennison,* 51 Ill. 319; *Kelly v. McCarty,* 75 Kan. 818, 88 Pac. 882; *McConnell v. People,* 84 Ill. 583."

Upon the present trial the defendant amended its answer accordingly, and alleged the value of the engine to be $1,000. The plaintiff did not amend its pleadings, except to reply to a sixth defense, which the defendant withdrew before the cause was submitted. The jury returned a general verdict for the defendant. The notes were dated July 20th, 1901, and the sale which the Court of Appeals declared void was held on October 24, 1902.

A witness for the plaintiff testified by deposition that as agent for the plaintiff he sold the engine in May, 1903, for the sum of $476.80. The court instructed the jury not to consider this testimony, and this is the principal error contended for by plaintiff. This was not evidence of value of the engine at the time of the chattel mortgage sale. But

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it is contended that it was the amount received at a private sale authorized by the Mortgage.

As was said by the Court of Appeals, while a private sale was authorized by the mortgage, the pleadings of plaintiff alleged a public sale under the mortgage, and it cannot be permitted to recover on a subsequent private sale not pleaded, but in fact concealed throughout the former trial.

The plaintiff offered one witness who testified that the value of the engine was from three to four hundred dollars. The defendant produced two witnesses who testified that its value was one thousand dollars. The jury was justified in finding the value to be at least $650.00 with interest from the date of the notes to the time of the mortgage sale, and this finding will not be disturbed. The judgment is affirmed.

Mr. Chief Justice White not participating.

No. 8880.

MEYER v. NELSON, ET AL.

Decided October 8, 1917. Rehearing denied December 3, 1917.

Action for rescission of contract. Judgment for defendants.

Affirmed.

1. APPEAL AND ERROR—*Equity—Special Verdict.* Assignments of error based upon contradictory answers in a special verdict returned in a chancery case, are without merit, as the trial judge in his capacity as a chancellor, is the real arbiter of the cause.

2. CONTRACT—*Rescission.* In the absence of fraud, courts will not relieve parties from the effects of their speculative ventures or hasty and ill-considered agreements.

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Error to the District Court of Delta County, Hon. Thomas J. Black, Judge.

Mr. M. D. VINCENT, Mr. MILTON R. WELCH, for plaintiff in error.

Mr. MILLARD FAIRLAMB, for defendants in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

THIS is an action wherein plaintiff sought to be relieved from a contract between himself and defendant, by the terms of which plaintiff purchased a half interest in a certain ranch with the stock, crops and implements thereon, together with a like interest in other lands, ditches and reservoir sites in Delta County. A prior action brought by plaintiff for the same purpose, on the ground of mutual mistake, was dismissed on demurrer; the present action is based on allegations of fraud and deceit. The trial judge, of his own motion, called a jury to answer special interrogatories. The answers thereto were in the main favorable to defendant and judgment was entered accordingly. Plaintiff brings the case here on error. The parties will be designated as in the court below.

Defendant, Nelson, was owner of a half interest in what is known as the Gunn ranch, the other half being owned by one Staples. A tract adjoining this property was filed upon by Nelson's wife as a desert claim. Nelson, in February, 1910, interested the plaintiff, Meyer, in a proposition whereby Meyer was to purchase Staples' interest in the Gunn ranch, together with a half interest in the desert claim and half of the stock, crop and implements on the land, and to bear half of the expense of building a reservoir and ditches to secure water sufficient to irrigate all the land. Part of this water was to be taken from Alkali Creek from which defendant had a priority of two and one-half feet. The remainder was to consist of surplus flood and winter water from the creek, together with flood waters

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from nearby gulches, to be stored in a reservoir to be constructed. Work was begun and payments made under a verbal agreement, which was superseded later by the written contract now sought to be set aside. In substance this contract provides that the ownership of all the property involved shall be vested in a corporation, the stock of which shall be issued in equal parts to Meyer and Nelson, and that in addition to the sum already paid by Meyer to Nelson, Meyer shall pay to him $10,000.00 in ten installments, with the privilege of meeting these payments out of the proceeds of the venture, if possible. Meyer's allotment of stock was deposited with Nelson as collateral, with provisions for forfeiture for non-payment after ten years.

Plaintiff now seeks to be relieved from the payment of the additional $10,000.00, on the ground that Nelson grossly and fraudulently misrepresented the amount of water available from Alkali Creek and from the proposed reservoir; and that he misstated the amount of land then under cultivation on the Gunn ranch, and took advantage of plaintiff's ignorance of irrigation methods to induce him to enter into a project that it was physically impossible to successfully complete. He also alleges that he was not given sufficient opportunity to investigate, and that, having lived in this State for only a short time, he was unable to judge for himself as to the possibility of irrigating all of the lands in the manner proposed by defendant.

Defendant denies all of these allegations and the issues are therefore made up on questions of fact. In its findings the trial court held that the alleged fraudulent statements were mere expressions of opinion, honestly made. This conclusion appears to have been reached by the jury in their answers to the special interrogatories; and their answers thereto are in the main fully approved by the court although they are in no wise binding upon it. *McGan v. O'Neil*, 5 Colo. 58; *Kirtley v. Marshall S. M. Co.*, 8 Colo. 279, 6 Pac. 920; *Porter v. Grady*, 21 Colo. 74, 39 Pac. 1091. Those assignments of error which are based upon contradictory answers in the special verdict are without merit,

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as the trial judge in his capacity as chancellor, was the real arbiter of the cause. *Buckers Irr. Mill. & Imp. Co. v. Farmers' Ind. Ditch Co.*, 31 Colo. 62, 72 Pac. 49; *Hobson v. Anderson*, 34 Colo. 444, 83 Pac. 634.

From the opinion of the court it is apparent that while the trial judge was impressed that plaintiff might have made a bad bargain, he was equally satisfied that defendant was governed by an honest intent throughout the whole transaction. In *Wier v. Johns*, 14 Colo. 493, 24 Pac. 262, it appears that the court was asked to relieve a plaintiff in a similar situation. The question there was whether certain tracts of land conveyed by plaintiff to defendant and which were presumed to contain approximately ten acres each, were known by defendant to contain much more than that area. The court said:

"The only question necessary to be determined is whether appellant was overreached by fraud and concealment on the part of the appellee, and, through misapprehension of the facts or by mistake, conveyed more land than he intended, and the other had a right to require. It is apparent from the evidence that appellant was, in the transaction, generous in the extreme, conveying a very large and valuable property for apparently a very inadequate consideration, and conscientiously carrying out an oral agreement when it could not have been enforced, perhaps, at law. It is equally apparent that appellee was selfish and exacting. But these are matters outside of the limits of proper examination in this court. A court of equity cannot relieve a party from the effects of generous, hasty or inconsiderate acts entered upon understandingly, however ill-advised and injurious they may be."

In the case at bar it may well be that plaintiff entered into an hasty and ill considered agreement. This court, however, cannot, in the absence of fraud, and clearly fraud has not been established, relieve parties from the consequences of their speculative ventures, and the judgment will be affirmed.

Mr. Chief Justice White not participating.

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No. 9015.

MARTIN *v.* THE PEOPLE.

Decided October 8, 1917. Rehearing denied December 3, 1917.

Defendant was convicted for a violation of the non-support act.

Affirmed.

1. STATUTES—*Reasonableness of.* Courts have no concern with the wisdom or reasonableness of legislative acts.

2. CONSTITUTIONAL LAW—*Nonsupport Act.* Chap. 179, S. L. 1911, providing for imprisonment of men who fail to support their wives and children, does not violate sec. 12, art. II of the constitution prohibiting imprisonment for debt.

3. CRIMINAL LAW—*Nonsupport Act—Validity of.* The power granted to courts by the nonsupport act, to suspend sentence upon the giving of a bond, is not in conflict with the constitutional requirement for sentence in felony cases; neither is it an infringement upon the pardoning power of the Governor.

4. CONSTITUTIONAL LAW—*Title of Act:* Where the particular case under consideration is clearly covered by the title, the nonsupport act must be accepted as valid under sec. 21, art. V of the constitution concerning the title of legislative acts.

The question of whether other portions of the act violate the section, not decided.

5. JUVENILE COURT—*Jurisdiction.* Jurisdiction of the juvenile court in the case under consideration sustained on authority of Colias v. People, 60 Colo. 230.

Error to the Juvenile Court, City and County of Denver, Hon. Ben B. Lindsey, Judge.

Mr. E. N. BURDICK, Mr. JOHN DEWEESE, Mr. EDGAR CAYPLESS, for plaintiff in error.

Mr. LESLIE HUBBARD, Attorney General; Mr. BERTRAM B. BESHOAR, Assistant; Mr. CLEMENT F. CROWLEY, for the people.

En banc.

MR. JUSTICE HILL delivered the opinion of the court.

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THE plaintiff in error was convicted for the violation of our so-called non-support act (chapter 179, Laws 1911) for his willful failure to support his infant child. The errors assigned challenge the validity of this act, as well as the jurisdiction of the juvenile court. It is urged that the act is in conflict with both state and federal Constitutions; that it is meaningless, ambiguous, uncertain, and unintelligible; that it makes any distinction between a prosecution for a felony or misdemeanor dependent upon the whim or caprice of the trial judge, etc. A large portion of counsel's brief is directed to the wisdom of this act, its reasonableness, etc. As these are matters with which we, as a court, have no concern, we shall make no comments concerning them.

Attention is called to section 12, art. II, of our Constitution, which prohibits imprisonment for debt. The theory of counsel is that, as the act allows suspension of sentence upon giving bond to support the child and later the sentence should be enforced because the conditions of the bond had been violated, the plaintiff in error would then be sent to the penitentiary because he had not paid a debt fixed by the judgment of the court. This position is untenable. The sentence was for the crime for which the plaintiff in error was convicted. The statute provides a method whereby he can avoid its execution, but if he fails to do this, it still remains a sentence for the crime and not an imprisonment for debt. Similar provisions have been upheld in other jurisdictions. *People v. Heise*, 257 Ill. 443, 100 N. E. 1000; *State v. English*, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F, 977; *State v. Brewer*, 38 S. C. 263, 16 S. E. 1001, 19 L. R. A. 362, 37 Am. St. Rep. 752; *In re Wheeler, Petitioner*, 34 Kan. 96, 8 Pac. 276; *Musser v. Stewart*, 21 Ohio St. 353; *Ex parte Cottrell*, 13 Neb. 193, 13 N. W. 174.

It is urged that the power granted to the court to suspend sentence upon the giving of a bond is in conflict with the constitutional requirements for sentence in felony cases, also that it is an infringement upon the pardoning power of

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the Governor, and that for these reasons the act is void. We cannot agree with either of these contentions.

In *Grundel v. People*, 33 Colo. 191, 79 Pac. 1022, 108 Am. St. Rep. 75, this court said: "In the absence of a permissive statute, the indefinite postponement of sentence upon one convicted of crime deprives the court of jurisdiction to pronounce sentence at a subsequent term. Such postponement is, in effect, a discharge of the prisoner, and therefore ousts the court after the expiration of the term of further authority over him. * * *"

This declaration involved a charge of gambling, where, in August, 1900, the district court records recite that defendants appeared, and upon their motion and request further proceedings were stayed upon payment of costs until the district attorney moved for sentence and their recognizance continued. No further steps were taken in the case until November, 1903, at which time the district attorney moved for sentence, which, it was held, the court was, at that time, powerless to impose, but this was over three years after the time of postponement. In *Young v. People*, 53 Colo. 251, 125 Pac. 117, the defendant entered a plea of *nolo contendere*. The court, on this plea, ordered that the cause be retired from the docket upon the payment of costs with leave to the people to have an *alias capias* for the defendant's arrest at any time and to reinstate the case for further proceedings. The defendant was thereafter arrested and brought before the court when sentence was imposed. This was about three months after the original suspension. It was held, as sentence was imposed within the term, the original order of suspension did not have the effect of an indefinite sentence. These cases were determined where there was no statute authorizing such suspensions, etc., for which reason neither controls this action. While section 4 of article XVIII of the Constitution defines the term "felony" wherever it may occur in the Constitution or laws to mean a criminal offense, punishable by death or imprisonment in the penitentiary and none other, it does not follow, in the absence of language in the Consti-

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tution to that effect, that everyone convicted of felony must, of necessity, be sentenced to the penitentiary. The Constitution does not thus provide, and such has never been the uniform practice in this state. For instance, take one of our present larceny acts of live stock enacted first in 1877, amended and re-enacted in 1891, it makes the theft of an animal grand larceny, regardless of value. The punishment is imprisonment in the penitentiary or a fine, in the discretion of the court; yet from 1877 up to the present time we have never heard of any transgressor of this act complaining, though its violation is a felony, because he was let off with the more lenient punishment of a fine as it permits. As used in section 4 of article XVIII of the Constitution, the phrase "and none other" means no other offense; that is it relates to the word "offense," and not to the character or mode of punishment. *People v. Godding*, 55 Colo. 579, 136 Pac. 1011.

The act under consideration provides for imprisonment in the penitentiary for a term not exceeding one year, but the court may, in lieu of this penalty, accept from the person convicted a bond, etc., running to the people, etc., in a sum not exceeding $1,000, as the court shall direct, conditional that the convicted party will comply with the provisions of the act, or perform the conditions required by the court for his compliance with the act in case he is placed on probation. It further provides that, in the interest of justice and for the protection of the wife and children, the court may suspend the sentence upon conditions to be named by the court, which conditions shall require the defendant to perform his duty towards his wife and children, and so long as such conditions are complied with, such sentence may be suspended, but upon failure to comply with such conditions or the conditions named in any bond, etc., he may be arrested, sentence passed or enforced, etc. It is these provisions which, it is claimed, interfere with the Governor's pardoning power as provided by the Constitution. We need not concern ourselves with the general rule upon the suspension of sentences, as our statute authorizes

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a suspension in cases of this kind, and the courts are uniform in their holdings that the suspension of a sentence like the one under consideration does not conflict with the pardoning power of the Governor. *People ex rel. Forsyth v. Court of Sessions,* 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856; *People v. Goodrich* (Sup.), 149 N. Y. Supp. 406; *People v. Stickle,* 156 Mich. 557, 121 N. W. 497; *People v. Heise, Supra; Ex parte Giannini,* 18 Cal. App. 166, 122 Pac. 831; *People v. Patrich,* 118 Cal. 332, 50 Pac. 425; *State ex rel. Buckley v. Drew,* 75 N. H. 402, 74 Atl. 875; *State v. Osborne,* 79 N. J. Eq. 430, 82 Atl. 424; *Marks v. Wentworth,* 199 Mass. 44, 85 N. E. 81; *Belden v. Hugo,* 88 Conn. 500, 91 Atl. 369; *State v. Everitt,* 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848; *St. Hilaire, Petitioner,* 101 Me. 522, 64 Atl. 882; *Fults v. State,* 2 Sneed (34 Tenn.) 232.

As was well said by the Court of Appeals of New York in *People ex rel. Forsyth v. Court of Sessions,* 141 N. Y. at page 294, 36 N. E. at page 388, 23 L. R. A. 856:

"The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities, remain and become operative when judgment is rendered. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. It removes the penalties and disabilities and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity."

In *People v. Stickle,* Michigan's wife-abandonment statute was under consideration. It is quite similar to ours. In passing upon this question, the court, 156 Mich. at page 563, 121 N. W. at page 499, said:

"The power to suspend sentence and the power to grant reprieves and pardons are distinct and different in origin and in nature. It has never been supposed that the power of courts to suspend sentence was other than a judicial

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function. It has been frequently and constantly exercised by courts of record before and since the adoption of the Constitution. * * * Assuming the power to be, as it was at common law asserted to be, a power inherent in courts, no new power is conferred upon courts when the Legislature in terms authorizes courts to suspend sentence. * * * We do not find in the language employed in the act or in its probable effect if enforced any encroachment upon the exclusive power of the executive to grant pardons."

Similar language will be found in many of the other cases cited, which line of reasoning leads irresistibly to the conclusion that this portion of the act is not in conflict with the Governor's constitutional power to pardon. The title of the act under consideration reads: 'An act to compel men to support their wives and children and providing that persons who violate this act shall be guilty of a felony, and concerning the powers of courts in such cases."

It is urged there are two subjects in the act, while but one in the title, for this reason that it violates the provisions of section 21, article V of our Constitution. It is claimed that the title limits its provisions to compel men to support their wives and children, that is, their children by such wives, while in the body of the act it attempts to compel men to support women not their wives and illegitimate children. Section 21 of article V of the Constitution provides that the title to such laws as this shall contain but one subject, which shall be clearly expressed in the title, but if any subject shall be embraced in any act which shall not be expressed in the title, that such act shall be void only as to so much thereof as shall not be so embraced. The record discloses that the plaintiff in error is the father of the child in question; she was born during lawful wedlock; hence a legitimate child. Her case is clearly covered by the title of the act, for this reason that portion of it must be accepted as valid by the terms of the section of the Constitution which counsel seek to take advantage of. Whether that portion of the act which they claim pertains to illegitimate children is valid or not can well be left for

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determination until a case involving that question is before us.

Counsel have omitted to present any reasons or cite any cases tending to disclose that this act violates the Constitution of the United States, for which reasons we will not discuss that assignment. The jurisdiction of the juvenile court (in this case) is fully sustained by the reasoning in *Colias v. People*, 60 Colo. 230, 153 Pac. 224, pertaining to section 2 of the act creating that court.

Perceiving no prejudicial error for any reason presented in support of the assignments of error urged, to which this opinion is limited, the judgment will be affirmed.

Mr. Justice White not participating.

Mr. Justice Teller concurs specially in the judgment on the ground that the plaintiff in error is not shown to be affected by those provisions of the act which he alleges are in conflict with the Constitution; hence he cannot be heard to question its constitutionality.

No. 9252.

THE FULTON INVESTMENT COMPANY ET AL. v. TROGLER.

Decided October 8, 1917. Rehearing denied December 3, 1917.

Action for accounting and retransfer of property. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

Mr. EDWIN H. PARK, Mr. THOMAS H. GIBSON, for plaintiffs in error.

Mr. WILLIAM H. DICKSON, for defendant in error.

Department One.

Per Curiam:

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The application for supersedeas is denied and the judgment affirmed.

Mr. Justice Scott sitting for Mr. Chief Justice White.

No. 9255.

HACKETHAL v. HACKETHAL.

Decided October 8, 1917.

Affirmed.

On Application for Supersedeas.

Error to the District Court of the City and County of Denver, Hon. H. P. Burke, Judge.

Mr. MILNOR E. GLEAVES, for plaintiff in error.

Messrs. MORRISEY, MAHONEY & SCOFIELD, for defendant in error.

Per curiam.

WE have carefully examined the record in this case, and find no error therein. The application for a supersedeas is therefore denied, and the judgment affirmed.

No. 8708.

WARNER, ET AL., v. THURINGER.

Decided November 5, 1917. Rehearing denied December 3, 1917.

Action for damages for malicious prosecution. Judgment for plaintiff.

Reversed.

1. MALICIOUS PROSECUTION—*Malice.* In a case of malicious prosecution, malice is an essential element of the cause of action, and a finding of the jury that defendants were not actuated by malice is decisive of the case.

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Error to the County Court of the City and County of Denver, Hon. W. C. Hood, Judge.

Mr. HUGH MCLEAN, for plaintiffs in error.

Mr. J. A. C. REYNOLDS, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

THE defendant in error recovered a judgment of one dollar against each of the defendants in an action for malicious prosecution. The parties will be designated herein as they were in the trial court.

The action was begun in a justice court and was there tried to a jury which disagreed. It was then tried to the court on the evidence in the former trial and judgment rendered for the defendants. The case, having been appealed to the county court, was there tried to a jury, a verdict in favor of one of the defendants, Elizabeth Freitag, was directed and returned, and the jury disagreed as to the other defendants. On a second trial the jury returned a verdict against the defendants,—but finding that neither was guilty of fraud, malice or wilful deceit. Judgment was entered on the verdict, and the cause is now here for review.

This litigation grew out of a prosecution of the plaintiff for violating the election laws while acting as a judge of election.

Since malice is an essential element of the cause of action, the finding by the jury that neither defendant was actuated by malice is decisive of the case.

The judgment is accordingly reversed with directions to dismiss the case.

Mr. Justice Hill and Mr. Justice Scott concur.

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No. 8726.

DENVER & RIO GRANDE R. R. Co. *v.* PTOLEMY.

Decided November 5, 1917. Rehearing denied January 7, 1918.

Action against a railroad company for personal injuries. Judgment for plaintiff.

Reversed.

1. RELEASE—*Fraud.* Where a person sustaining personal injuries alleged to have been caused by the negligence of a railroad company, gives a full release and settlement for a valuable consideration, he has no cause of action unless the release is vitiated by fraud in obtaining it.

2. FRAUD—*Proof.* To prove fraud in obtaining a release of a claim for personal injuries, the evidence must be clear, precise and indubitable. The burden of making this proof is on the plaintiff.

3. *Fraudulent Misrepresentations.* A railroad company's physician who stated "as his opinion" plaintiff's injuries were not serious, was not guilty of false misrepresentations. If plaintiff was in fact suffering from internal injuries which the physician failed to discover, such failure might indicate negligence on his part.

4. RAILROADS—*Physician—Negligence.* A railroad company is liable for the negligence or incompetence of a physician employed by it, only in case it appears that it knew or should have known of his unfitness.

Error to the District Court of San Juan County, Hon. W. N. Searcy, Judge.

Mr. E. N. CLARK, Mr. J. G. MCMURRY, Mr. FRANK L. ROSE, for plaintiff in error.

Mr. WM. A. WAY, Mr. H. E. CURRAN, for defendant in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

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THE defendant in error had judgment against the plaintiff in error in an action for damages for personal injuries.

The complaint alleged negligence on the part of defendant in several particulars, and serious injury to the plaintiff while being carried as a passenger by the defendant.

The answer denied negligence, and set up as a special defense the giving by plaintiff of a full release and settlement in consideration of the payment to her of four hundred and fifty dollars.

Plaintiff replied, admitting the making of the release, and the receipt of the money, but alleged:

"That she was induced to accept said amount by reason of the false and fraudulent representations made to her by defendant's said claim agent and by defendant's physician as to her condition and as to the nature and extent of her injuries."

It is further alleged that the statements and representations made by defendant's physician as to plaintiff's physical condition: "were false and untrue, were known by defendant's said physician to be false and untrue, and were made for the purpose and with the fraudulent intent to induce plaintiff to believe and rely upon the same, and to induce plaintiff to make said pretended settlement and release defendant from liability." The plaintiff was injured by the derailment of one of defendant's cars, and taken to a hospital in Durango, and there treated for seven weeks by physicians employed therefor by the defendant.

Unless the release—admitted to have been given—was vitiated by fraud in obtaining it, as charged in the replication, the plaintiff had no cause of action.

The plaintiff had the burden of proving the charge that the defendant's agents—the doctors and the claim adjuster—deliberately and consciously misrepresented to the plaintiff her physical condition, with intent to induce her to make the settlement, and that she was thereby induced to make it. To prove fraud the evidence "must be clear, pre-

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cise and indubitable." *D. & R. G. R. R. Co. v. Sullivan*, 21 Colo. 302, 41 Pac. 501.

It cannot be said that such evidence was presented in this case. Plaintiff herself testified only that the physician who had entire charge of the case, after her first day in the hospital, and during her stay there, stated "as his opinion" that her injuries were not serious. She now complains that she was in fact suffering from internal injuries, but in at least two places in her brief it is said that defendant's physicians failed to discover such injury. Clearly, then, they were not and could not be guilty of fraudulent misrepresentation as to that injury. If they failed to discover it, that might indicate negligence on their part, but that is no part of the issue made by the pleadings.

If the physicians were negligent or incompetent, the defendant would be liable for the results of such negligence or incompetence only in case it appeared that the defendant knew or should have known of the physician's unfitness; and that, too, in a case where the pleadings presented that question. A physician's diagnosis is necessarily a matter of opinion, except in cases where the ailment is external and visible. There is in this record no evidence which even raises a suspicion that the statements made to plaintiff as to her condition were not made in perfect good faith. Neither of the physicians who attended her for the defendant was present at the settlement, nor did they at any time take part in the negotiations for it. The attempt to invalidate the contract of settlement wholly failed.

The evidence failing to justify the setting aside of the settlement, plaintiff had no cause of action, and the motion for a non-suit should have been sustained.

The judgment is reversed, and the cause remanded to the district court for further proceedings in harmony herewith.

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No. 8869.

GROVER v. CLOVER, ADMINISTRATOR.

Decided November 5, 1917. Rehearing denied January 7, 1918.

Action to cancel deed of trust. Judgment for plaintiff. *Affirmed.*

1. PROBATE LAW—*Powers of Administrator.* Sec. 7140 R. S. 1908, expressly confers the power upon an administrator and makes it his duty to sue for, recover and preserve the estate, both real and personal.

2. *Widow's Allowance.* In this jurisdiction a widow's allowance is not in the nature of an interest in an estate; it is not something which goes to the widow by descent, but is a preferred claim against the estate. It is a part of the expense of administration.

3. HUSBAND AND WIFE—*Fraudulent Conveyance.* Where a husband disposes of his property in trust for the use of another, for the purpose of defeating the rights of his wife, reserving to himself a life interest, the transaction is a fraud upon the wife from which she may be relieved after his death.

4. REAL PROPERTY—*Limited Estate.* The policy of the law does not permit property to be so limited as to remain in the grantor for life, free from the expense of property and not subject to his debts.

Error to the District Court of the City and County of Denver, Hon. H. S. Class, Judge.

Mr. O. A. ERDMAN, for plaintiff in error.

Miss MARY F. LATHROP, Mr. HARRY F. ANDERSON, for defendant in error.

En banc.

MR. JUSTICE SCOTT delivered the opinion of the court.

THE complaint in this case was by the administrator of the estate of Charles F. Grover, deceased. It alleged allowance by the county court of claims against the estate

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for funeral expenses, and a claim by the widow for a widow's allowance, and that the administrator has no funds in his possession or under his control to pay such claims, or any of them, or the necessary expenses of administration. That in his life time the deceased had executed a deed of conveyance to one Elizabeth M. Fowler for certain real estate, in trust for the use and benefit of his son, Charles G. Grover. The condition of the trust, recited in the deed is as follows:

"That all the rents, income and profit of the said property, as the same accrue after deducting taxes and other proper expenses, be paid to me during my natural life, and upon my death the said trust shall thereupon at once cease and determine and the said premises hereby conveyed shall thereupon become vested in my son, Charles Glenn Grover, and I direct that a deed so conveying the same to him shall at once by said trustee be made, executed and delivered to my said son. In the event of the death of said trustee before my decease, then I name and appoint John Howard Fowler, her son, as trustee and successor in trust, subject to the terms and conditions of this deed."

The deed was executed on the 17th day of January, 1911. The decedent died on April 17th, 1912. It is further alleged that the deceased continued in possession of the premises, using and claiming same as his own, and received the rents and profits therefrom, until the time of his death, and that the trustee did not exercise or attempt to exercise control of the premises, and did not obtain or attempt to obtain possession thereof during the life time of the deceased, and that the widow of the deceased was without knowledge of the execution of said deed, until after the death of her husband. Further, that after the death of the grantor, the trustee Fowler executed a deed for the premises to Charles G. Grover as directed by the trust deed, but that the deed of trust was not recorded until after the death of the grantor. These allegations were sustained by the proof. The prayer was for the cancellation of both deeds and that the title be declared to be in the estate of

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deceased. The trial court found generally for the plaintiff and rendered judgment accordingly.

Many interesting questions are raised and discussed in the briefs, but it is not necessary to consider any of these aside from two, viz: was the administrator authorized to institute the suit, and is the deed void as against lawful claims against the estate.

Without discussion, Sec. 7140 Rev. Stat. 1908, must be held to confer sufficient authority upon the administrator to bring the action. Indeed, the section expressly confers the power upon the administrator, and makes it his duty to "sue for, recover and preserve the estate both real and personal." We have in this case the finding of insolvency of the estate, and the necessity to sell the real estate in question, to discharge the expense of administration, if the lawful title be in the estate. The funeral expenses are admitted to be unpaid. The widow's allowance is fixed by statute, and that there are no other assets than the real estate in controversy, is not disputed.

It is settled in this state that a widow's allowance is not in the nature of an interest in an estate, it is not something which goes to the widow by descent, but is a preferred claim against the estate, to be paid out of the personal property, if sufficient for that purpose, and if not, then the lands of the deceased must be sold to pay it. It is in fact a part of the expense of administration. *Wilson v. Wilson*, 55 Colo. 70, 132 Pac. 67; *Deeble v. Alerton*, 58 Colo. 166, 143 Pac. 1096, Ann. Cas. 1915C, 863. It is plain, therefore that if the lawful title to the real estate in question remained in the deceased at the time of his death it was within the right and duty of the administrator to have that question determined and thereafter to proceed in a lawful way to cause its sale to defray such charges against the estate.

In this case the facts disclose that the beneficiary under the trust deed was a son of the deceased by a former wife; that the deceased about the same time conveyed other property to his said son, and that by these acts including

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the execution of the trust deed in question, the wife was left without any interest in the estate of deceased, and even without money to pay funeral expenses.

We think the case comes clearly within the principle announced in *Smith v. Smith*, 22 Colo. 480, 46 Pac. 128, 34 L. R. A. 49, 55 Am. St. Rep. 142. In that case and under a similar state of facts, Chief Justice Hayt, in a very able opinion held that notwithstanding that there exists in this state no right of dower, yet the spirit and letter of our statutes impose the duty upon the husband having property, to provide for the support and comfort of his widow after his demise, and that where the husband disposed of his property both real and personal, the transaction was colorable merely, and resorted to by him for the purpose of defeating his wife's right, but with the intent to reserve the benefit of the property to himself for life, it is a fraud upon the rights of his wife, from which she may be relieved after death.

The complaint in this case alleged:

"That the consideration, one dollar, was not paid; that the deed was not intended to convey the property to the trustee, but was executed to operate as a will, and to hinder, delay and defraud creditors, and to prevent the widow from inheriting the property; that the uses of said conveyance resulted to Charles F. Grover and his heirs, subject to the payment of his debts; that he continued in possession, using and claiming the property as his own, collecting the rents, not in any way recognizing the title of the trustee; that the trustee did not exercise, nor attempt to exercise, any control of the property, or to obtain possession in the lifetime of the decedent."

We must assume that the court so found, and see no reason for disturbing such finding.

Again, it has long been held that the policy of the law will not permit property to be so limited as to remain in the grantor for life, free from the incidents of property and not subject to his debts. 4 Kent. Com. 311; Bump on Fraudulent Conveyance, Sec. 189; *Ghormley v. Smith*, 139

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Pa. St. 584, 21 Atl. 135, 11 L. R. A. 565, 23 Am. St. Rep. 215.

The judgment is affirmed.

Mr. Chief Justice White not participating.

Mr. Justice Bailey dissents.

No. 9077.

PEARSON v. THE PEOPLE.

Decided November 5, 1917.

Under an information charging homicide, plaintiff was convicted of murder in the first degree.

Affirmed.

1. APPEAL AND ERROR—*Harmless Error.* Evidence of the killing of another person than the one charged in the information, is not prejudicial where it tends to show that such other person was not killed by defendant but by his companion.

2. CRIMINAL LAW—*Confession.* Upon the issue of whether a statement or confession made by one charged with a criminal act, is voluntary or involuntary, the finding of the trial court will not be disturbed where it is fully supported by the evidence.

3. EVIDENCE—*Res Gestae.* Evidence of the circumstances surrounding the arrest of one charged with a criminal act is admissible as a part of the *res gestae.*

4. INSTRUCTIONS. An instruction not justified by the evidence is properly refused.

Error to the District Court of Larimer County, Hon. Neil F. Graham, Judge.

Mr. THOMAS Y. BRADSHAW, Mr. JAMES H. BREWSTER, for plaintiff in error.

Mr. LESLIE E. HUBBARD, Attorney General, Mr. CHARLES ROACH, Assistant, for The People.

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En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiff in error was convicted of murder in the first degree and brings error. He was charged jointly with one Burns with the murder of one Roach, a sheriff of Wyoming, who had followed Pearson and Burns into this state whither they had brought some horses stolen by them in Wyoming. On motion of the district attorney the cause was dismissed as to Burns.

The first error assigned is in the admission of evidence relative to the killing of one Nielsen, with which plaintiff in error was not charged. It appears that Roach and Nielsen, with others, were spending the night on a ranch near which it was reported that two men with the stolen horses had been on the preceding day. In the night Roach left the bunkhouse where he had been staying, and in a few moments several shots were heard. When the other members of the party went out they found Roach and Nielsen dead from gunshot wounds. In testifying as to a post-mortem on Roach, two physicians testified also as to a post-mortem on Nielsen, stating the size of the bullets found in each case, with some description of the wounds. The bullet taken from Roach's body, a .44, and that taken from Nielsen's body, a .38, were introduced in evidence. When plaintiff in error was arrested, he had in his possession a revolver of .44 caliber. He testified that he handed to Burns a revolver of .38 caliber which he took from Nielsen before the shooting began.

On this state of the evidence it cannot be said that the testimony relative to the bullet taken from Nielsen's body was prejudicial to the plaintiff in error, since it tended to show that Nielsen was shot by Burns, and not by the defendant. Plaintiff in error testified that Burns killed Nielsen, and the mention of the bullet by the physician, and its introduction in evidence, were, therefore, not matters of which he can properly complain, even if they were not, as is contended, a part of the *res gestae*.

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The principal error argued is that a statement, or confession, made by the plaintiff in error while in jail was admitted in evidence. It is contended that it was not voluntary, although it contains a recital that it was made freely. The trial court, having heard testimony as to the circumstances under which it was made found that it was voluntary. We ought not, therefore, to disturb his finding, which is fully supported by the evidence. *Fincher v. People*, 26 Colo. 169, 56 Pac. 902.

It is also urged that the court erred in admitting evidence of the circumstances surrounding the arrest of plaintiff in error, the taking of arms from him, etc. This was a part of the *res gestae*, and admissible as such. *State v. Phillips*, 118 Iowa 660, 92 N. W. 876.

It is further contended that the court erred in refusing a requested instruction that the deceased, an officer of Wyoming, was not an officer in this state, and so entitled to the special protection of the law; and that if the jury found that Roach was killed while attempting to arrest the defendant, the identity of deceased and purpose being unknown to defendant and the killing was not in malice but in resisting arrest, then the killing would be manslaughter.

The instruction was properly refused, because the evidence did not justify the giving of it. Plaintiff in error testified that he found Nielsen in the barn, took his gun from him, and turned him over to the care of Burns; that they then started up the road; that, after going a few steps, he saw a form in the darkness, and called out "Throw up your hands." A voice replied: "Who is it?" He again said: "Throw up your hands," and the reply was: "Wait a minute, I will lay this rifle down here"; that Burns then ordered the unknown to throw up his hands, and a shot was fired by the deceased, to which plaintiff in error replied with three shots, and then Burns commenced firing. This does not show that Roach was killed by the defendant while resisting arrest. The defendant was the aggressor, and without provocation twice ordered Roach to hold up his hands. Such an order justified an inference by Roach that

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his assailant intended to rob him, and, if he fired at the defendant, as the latter asserts, he did only what he had the right to do if he supposed himself in serious danger. The defendant, having begun the affray, cannot claim the right to kill his antagonist because the latter resisted an illegal command to the extent to which defendant testified. The defendant, a moment previously, had robbed Nielsen of his gun and taken him in charge, and was then in possession of stolen horses, and attempting to escape from a known pursuit. With gun in hand he started from the barn, and when he was accosted by Roach, he attempted first to capture the unknown as he had done Nielsen and so prevent arrest. That plan failing, he shot to kill.

The jury was justified in concluding from these facts—and the further fact that Roach was shot in the back of the head—that the defendant had determined to make his escape, though it were necessary in doing so to kill anyone who might be likely to interfere with such plan. This conclusion is not based in the slightest degree on the official character of the deceased. It applies to any citizen, and hence there was presented no question which justified the requested instruction.

We find no error in the record, and the judgment is affirmed. It is further ordered that said judgment be executed during the week beginning February twenty-fourth, Nineteen Hundred Eighteen.

Mr. Justice Allen not participating.

No. 9183.

PEOPLE, EX REL., v. HIGGINS, AS STATE TREASURER.

Decided November 5, 1917.

Original Proceeding in Mandamus.
Alternative writ made absolute.

1. CONSTITUTIONAL LAW—*Construction.* The same principle which requires that two statutes be reconciled if possible, and both

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given effect, applies in the interpretation of different sections of the constitution.

2. STATUTE—*Constitutionality.* Chap. 122, S. L. 1917, providing *inter alia*, that school funds may be loaned on unencumbered cultivated farm lands within the state of Colorado, is not in conflict with sec. 1, art. II; sec. 25, art. V, or sec. 12, art. X of the state constitution, and is constitutional.

3. OFFICERS—*State Treasurer.* The state treasurer is only responsible for public funds in his possession until they pass out of his hands by lawful means or procedure, upon valid claims or legal loans.

Mr. LESLIE E. HUBBARD, Attorney General, Mr. FRANCIS E. BOUCK, Deputy, for petitioner.

Mr. GEORGE P. STEELE, for respondent.

En banc.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

THE relators, in attempting to carry out the provisions of the legislative act, adopted at the general election in 1916, entitled: "An Act in relation to the investment of the Public School Fund," Chapter 122, Session Laws 1917, page 446, were unable to do so because of the refusal of respondent to pay the amount of a loan ordered and approved by relators under the provisions of the statute. It is conceded that relators and the applicant for the loan have performed the duties imposed upon them by the terms of the act; and that, unless the statute is unconstitutional, the alternative writ heretofore issued out of this court should be made absolute.

Stated briefly, the legislative act provides, *inter alia*, that the school funds of the state shall be invested as directed by the State Board of Land Commissioners, in certain designated securities, among which are "loans on unincumbered cultivated farm lands within the State of Colorado, and in manner" as provided in the statute. The act pre-

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scribes that such loans shall be made only to persons who are actual residents on such land, the appraised value of which is not less than five dollars per acre, limits the amount that may be loaned to any one person, and fixes the rate of interest thereon. It requires that such loans be evidenced by the promissory note or notes of the borrower, and that the payment of the same shall be secured by a deed of trust to the public trustee in favor of the state upon real estate of such borrower of an appraised value of at least three times the amount of the sum borrowed. It requires the title to the land to be examined, and that the deed of trust securing the loan shall be a first lien upon the real estate. In case of default in the payment of the loan or interest thereon, the act provides for the collection of the entire sum "by foreclosure or such other procedure as may be necessary and appropriate." It authorizes the state, through certain designated officers, but does not require it, to bid in the real property at foreclosure sale, and provides that whenever any land is bid in by the state and is not redeemed according to law, a deed therefor shall be executed to the state and be recorded in the proper county; and requires the proper officials to levy and collect a tax upon all the taxable property in the state sufficient for the purpose and to reimburse the school fund for the amount of the loan. It further authorizes the State Board of Land Commissioners to sell such land so purchased and requires the proceeds thereof to be credited to the general fund of the state whether the same be "in excess of or less than the amount of the original loan," etc.

Respondent contends that as the legislative act empowers the state to become the purchaser at foreclosure sale of the lands securing the loan and requires it in case of purchase to raise by levy upon all taxable property within the state a fund sufficient for the purpose, and to reimburse the school fund for the amount of such loan, etc., it is in conflict with Section 1 of Article 11 of the Constitution. We do not concur in this view. The section prohibits the state, its subdivisions and municipalities from becoming respon-

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sible for the obligations or liabilities of any person, company or corporation whatever.

But there is another provision of the organic law—Section 3 of Article 9—that must be considered. This section makes the state treasurer the custodian of the school fund, commands that such fund shall be securely and profitably invested as may be by law directed, and makes it the imperative duty of the state to supply all losses of such fund that may in any manner occur. The same principle which requires that two statutes be reconciled, if possible, and both be given effect, applies in the interpretation and application of different sections of the same constitution, and we find no difficulty in holding that the state must be required to observe and obey these constitutional provisions. It has not failed in that regard by the enactment of the statute in question. Between these constitutional provisions and the statute we find no conflict. Under the statute the state, acting through its proper agents, may become the purchaser of the real estate securing the loan at a foreclosure sale thereof. It is equally true, however, that it need not become such purchaser. It may resort to any lawful "procedure that may be necessary and appropriate" in the collection of the loan. The statute does not, either directly or indirectly, impose upon the state any liability in the premises. The liability to replenish the school fund in case of loss thereto is by virtue of the constitutional provision. *Leddy, State Treasurer, v. The People, ex rel.*, 59 Colo. 120, 147 Pac. 365. There is nothing whatever in the statute enlarging the constitutional contingent liability, but simply provision made for the discharge thereof, if the same should become absolute. Since the state must, by constitutional mandate, make good all loss to the school fund, however occasioned, it is not under the necessity of waiting until loss occurs before the machinery essential to the discharge of its duty in the premises is created. The investment in the state of the right to become the purchaser at foreclosure sale constitutes a safeguard against loss which might otherwise result from a borrower's fail-

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ure to repay a loan. Whatever may be realized from subsequent sale of the property diminishes correspondingly the amount necessary for reimbursement of the school fund. It is, in effect, the protection which a prudent, conservative person values, and is in no sense an assumption of liability by the creditor. The same principle underlies this clause of the statute that is found in the one that authorizes counties to become the purchasers of property at delinquent tax sales. By acting thereunder the state in no sense assumes an illegal liability and in levying a tax in case of purchase, as provided by the statute, is simply discharging the duty imposed upon it by the organic law, to the end that the school fund shall always remain intact.

It is further contended that the statute violates the mandate of the constitution that the fund shall be "securely and profitably invested," for it is said, it places the credit of the state behind this feature of the legislative plan of loaning the fund. It is sufficient to say that the constitution, not the statute, effectuates this result. In fact the Constitution places the credit of the state behind every investment of the school fund. The statute in no wise affects the burden of the state in that regard, nor does it lessen the liability of the borrower in the premises. The constitutional section provides that the school fund shall be "invested as may be by law directed," and a further requirement is that such fund shall be "securely and profitably invested," but the determination of such questions is under legislative direction and, "in general, legislation respecting such matters must be left to the wisdom and discretion of the general assembly and of the chief executive of the state." *In re Loan of School Fund*, 18 Colo. 195, 199, 32 Pac. 273. We cannot say that the plan prescribed in the act before us does not meet the constitutional requirements in that regard.

Contrary to the contention of respondent, we are of the opinion that the act does not grant to farmers "any special or exclusive privilege, immunity or franchise," and is not in that respect violative of Section 25 of Article 5 of

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the Constitution. Properly considered, this feature of the act pertains to one of the designated classes of securities set forth in the statute in which the school fund may be invested. Other classes of securities are also therein named. As the fund "must be securely and profitably invested as may be by law directed," it was proper for the law-making power to restrict the investment to bonds and warrants of the state, bonds of school districts, counties, cities and towns of the state and to "loans on unincumbered cultivated farm lands within the state." Such are the securities designated in which the fund may be invested and such classification constitutes a valid exercise of legislative power.

It is further contended by respondent that the statute is in conflict with Section 12 of Article 10 of the Constitution. This section, *inter alia*, declares that, "The general assembly may provide by law further regulations for the safe keeping and management of the public funds in the hands of the treasurer, but, notwithstanding any such regulation, the treasurer and his sureties shall in all cases be held responsible therefor." Respondent concedes that the law-making power has authority to make regulations for the safe keeping and management of public funds by virtue of this constitutional provision, and by Section 3 of Article 9, *supra*, shall make provision for the investment of the school fund, but contends that it has no power to provide for the investment of such fund by any one other than the state treasurer. The claim is that as the treasurer and his sureties are absolutely responsible for the security of the public funds, and the legislature can not devolve the duty upon another, it would be illegal and unjust to require him to pay out the funds upon an investment which he had nothing to do in making, and may not approve. In support of the contention he relies upon *In re House Resolution*, 12 Colo. 395, 21 Pac. 486. The case does not support the contention. On the contrary, it is held therein that the legislature may command the treasurer to disburse such funds as it shall see fit, subject only to constitutional restriction,

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and that it may also direct the investment of the school fund and that the treasurer is only responsible for the safe keeping of the public money "till paid out or invested as authorized by statute." Unquestionably absolute liability rests upon the state treasurer in reference to all money actually in his custody, but it is equally certain that where the public money has passed out of his hands by lawful means or procedure, upon valid claims or legal loans, he has discharged his duty in the premises, and his liability in relation thereto ends.

The claim that the state treasurer alone may invest the fund has no support in the Constitution. That instrument does not even impliedly authorize him to do so. It makes him the custodian of, and responsible for, such fund, as of other public funds, and authorizes the legislature to provide by law further regulations for the safe keeping and management thereof. Had the intent been to invest the treasurer with the power of investing the fund, the language of the constitution would, doubtless, have been; "he shall securely and profitably invest the same," etc. No such words, or others of similar import, were used. On the contrary, the language employed clearly invests the law-making power with the duty of prescribing a plan, including the designation of agents to carry the same into effect, whereby the school fund may be securely and profitably invested. We are of the opinion that respondent's objections to the constitutionality of the law have no substantial basis, and the alternative writ heretofore issued should be made absolute. And it is so ordered.

No. 9293.

PLATT, ET AL., v. CARLTON, ET AL., TRUSTEES.

Decided November 5, 1917. Rehearing denied December 3, 1917.

Action to restrain trustees of school of mines from carrying out a contract relative to the employment of a president for the school. Complaint dismissed.

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Affirmed.

1. PLEADINGS—*Dismissal.* Where it appears that the complaint fails to state any facts that would authorize the court to grant relief, the action is properly dismissed.

Error to the District Court of the City and County of Denver, Hon. James L. Cooper, Judge.

Messrs. QUAINTANCE, KING & QUAINTANCE, for plaintiffs in error.

Mr. LESLIE E. HUBBARD, Attorney General; Mr. FRANCIS E. BOUCK, Deputy, for defendants in error.

En banc.

Per curiam.

PLAINTIFFS in error applied to the district court for an injunction against defendants in error as trustees of the School of Mines. A temporary restraining order was issued, and upon final hearing was dissolved, and the complaint dismissed because, in the opinion of the trial court, it failed to state any facts that would authorize the court to grant relief. The plaintiffs thereupon sued out this writ of error, and applied for a restraining order.

The plaintiffs were taxpayers, and the alleged purpose of the injunction was to prevent the defendants, as the trustees of the School of Mines, from carrying out an alleged contract entered into by three of such trustees, in their individual capacity and not at a board meeting, with one Alderson, to the effect that they would, upon certain terms stated, employ him as president of such School of Mines. This complaint, however, discloses that the real purpose of the suit was to prevent the defendants in error, as trustees of the School of Mines, from electing said Alderson president of such school. No one claims any rights under the alleged contract; in fact, plaintiffs allege and defendants concede that it is void. No member of the board of trustees is here complaining; and for aught that

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this record discloses each trustee, when convened in regular session as a board of trustees in accordance with law, will discharge his duty as such. We are of the opinion that the trial court was right in dismissing the suit. The application for restraining order is therefore denied, and the judgment affirmed.

No. 8509.

MARIANS v. THE PEOPLE, EX REL.

Decided December 3, 1917.

Information charging plaintiff in error with contempt of court by circulating a petition to recall a district judge. Judgment of guilty.

Reversed.

1. CONTEMPT—*Recall of Judge.* Under Art. XXI of the constitution, which authorizes a recall from office, the circulation of a petition for the recall of a district judge is not contempt of court, where the facts set out in the petition are truthfully stated, though with uncalled for bitterness. Such a petition is privileged.

2. *Constitutional Abridgment.* The right to punish as for contempt may be taken from the courts by constitutional provisions.

Error to the District Court of Las Animas County, Hon. Robert G. Strong, Judge.

Mr. O. H. DASHER, Mr. T. S. MCCHESNEY, for plaintiff in error.

Mr. FRED FARRAR, Attorney General; Mr. RALPH E. C. KERWIN, Assistant, for the people.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

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THE plaintiff in error was adjudged guilty of contempt in the District Court of Las Animas County, and fined fifty dollars, and committed to the county jail until the fine was paid.

The proceeding was instituted by the president of the Las Animas County Bar Association, who filed an information charging the plaintiff in error with contempt of the court and the presiding judge thereof "by writing, printing, publishing and circulating a so-called 'petition to recall District Judge A. W. McHendrie from office.'"

The information alleges that two cases were pending in said District Court, when said petition was circulated, in which Walter Belk and Robert Uhlick were respectively defendants and charged with the crime of murder. The petition is then set out as follows:

"The general statement of why Judge A. W. McHendrie should be recalled from office is as follows: Because he freed on bail, without any showing made, mankiller Walter Belk of the Baldwin-Felts Detective Agency, whose hands reek with blood from the slaying of Organizer Lippiatt, and at the same time imprisoning for months in a foul jail without bail, Organizer Bob Uhlich, believed by Trinidad citizens to be innocent of crime; both Belk and Uhlich being charged with murder in the first degree, and because this judge four times refused Uhlich bail—the last request being signed by the district attorney—in spite of the fact that the judge is recorded as putting it up to the district attorney to decide upon granting Uhlich bail, and because the judge said that Northcutt, the notorious agent of the coal operators, must sign Uhlich's bail application before he would grant it, notwithstanding that this same Northcutt objected to bail on a former occasion and told the judge that Uhlich had done 'more than any four men towards organizing' the striking miners in defense of their wives and children, and that the judge well knew that he might just as well ask John D. Rockefeller to beg for bail for Uhlich as this Northcutt."

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The defendant filed no answer to the information, and on the hearing he announced to the court: "That he had no plea to make further than the right of a citizen of the State of Colorado to circulate a recall petition setting forth in plain words the reason why the recall of Judge McHendrie was desired."

Article XXI of the Constitution which authorizes a recall from office, provides that the petition for recall: "Shall contain a general statement, in not more than two hundred words, of the ground or grounds on which such recall is sought, which statement is intended for the information of the electors, and the electors shall be the sole and exclusive judges of the legality, reasonableness and sufficiency of such ground or grounds assigned for such recall, and said ground or grounds shall not be open to review."

The court treated the defendant's statement as a confession of guilt, and imposed the penalty above mentioned.

For the plaintiff in error it is contended that the matter set out in the petition is privileged, it being the right of any citizen to state in a recall petition the reasons why a public officer should be recalled.

The theory of counsel is that the common law, which would or might make the author of this petition liable for contempt, is repealed, so far as it applies to this case, by the constitutional provision for a statement of the grounds for recall.

Clearly that provision intends that when a citizen is of the opinion that a public officer, subject to recall, has done that which shows him to be unfit for the office which he holds, the citizen may make such act the basis of an attempt to recall the officer; and to do that he must necessarily mention said act in the recall petition. We have held that it was no contempt to set out in a petition for a change of venue the *facts* upon which it was based. *In re Smith,* 54 Colo. 486, 131 Pac. 277.

If a citizen has not this privilege, the right to inaugurate a movement for a recall in such a case does not exist. Unless the action of a judge in a pending case may be

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mentioned as a ground of recall, he may, by repeating that action in succeeding cases, entirely prevent the making of a valid recall petition based upon such action. The result is to withdraw the office of judge from the scope of the constitutional provision which clearly includes that office.

That a considerable portion of the statement was intemperate and ill-advised must be conceded; but, if the facts are stated truthfully, though with uncalled-for bitterness, no contempt was committed. What should be the rule in case a petition contains defamatory matter shown to be false, need not now be considered, since there is nothing in the record to show that the statements in the petition are not true.

This fact renders many of the cases cited by the State of no value, since they refer to false statements.

The right to punish as for a contempt may be taken from the courts by constitutional provisions, and, as we are of the opinion that the right is given to citizens to set up in a petition for the recall of a judge the facts upon which such recall is sought, even though they might tend to obstruct the administration of the law, we need not consider whether or not the statements in this petition tend to do so.

We find that the petition is privileged, for the reasons above stated. The judgment is accordingly reversed, and the cause remanded to the District Court with instructions to dismiss the information, and discharge the plaintiff in error.

Mr. Chief Justice White not participating.

Mr. Justice Garrigues dissenting.

No. 8656.

PACE, ET AL. v. BECKETT, ET AL.

Decided December 3, 1917.

Action to recover for services rendered in connection with farm cropping contract. Judgment for plaintiffs.

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Reversed.

1. CONTRACT—*Construction.* A contract for the cultivation of land for a share of the crop is a special one, partaking somewhat of the nature of an adventure. It is not a contract of employment.

2. ACTION—*Breach of Contract.* Under a contract for the cropping of land upon shares, the cropper does not become a servant by a breach thereof on the part of the owner of the land and he can not, on account of such breach, maintain an action upon *quantum meruit* for the value of his services.

3. APPEAL AND ERROR—*Evidence.* In the trial of an action for breach of a cropping contract, it is error to permit the introduction, over objection, of evidence concerning the prevailing rate of wages for work performed by the cropper while carrying out the terms of the contract.

4. *Objections to the Record on Error*, made for the first time in the appellate court, are too late.

Error to the District Court of La Plata County, Hon. W. N. Searcy, Judge.

Mr. JAMES A. PULLIAM, Messrs. PERKINS & MAIN, Mr. L. M. PERKINS, for plaintiffs in error.

Messrs. RUSSELL & REESE, for defendants in error.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

IT APPEARS from the pleadings and the evidence in this case that on or about February 10, 1914, the defendants below, who owned a tract of land, entered into an oral contract with plaintiffs below, with reference to carrying on farming on the land. By the terms of the agreement the defendants were to furnish the grain necessary to seed the ground, and machinery; the plaintiffs were to do the work of farming, including the irrigation of the land, and were to receive one-half of everything that was raised; and the defendant A. L. Pace was to show the plaintiffs "about irrigating" and how and where to do the work pertaining to the cultivation and raising of the crops.

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On September 1, 1914, the plaintiffs below brought this action against the defendants below. The complaint briefly mentions the contract above referred to, and then alleges, in substance, that pursuant to the agreement the plaintiffs worked on the land, each of them about five months, having worked almost continuously until and including the 9th day of July, 1914. The complaint further alleges, in effect, that the contract was wrongfully terminated by the defendants on July 9, 1914 and plaintiffs were no longer permitted to work thereunder or to have any further control over the crops raised or to be raised under the contract; that certain planting was done by the plaintiffs and that the defendants have received the benefit thereof; that plaintiffs worked and irrigated about thirty acres of timothy hay; and that the reasonable value of the services performed by plaintiffs for defendants under the contract is $780.00, which the defendants have never paid plaintiffs, save and except a certain sum in cash and a certain amount of groceries. The prayer is for the recovery of the value of the services mentioned, less the items received from defendants.

The defendants filed an answer which, for the purposes of this review, may be regarded as a general denial. Defendants also filed a cross-complaint concerning matters which are not involved in any assignment of error.

Upon trial, the jury found the issues for the plaintiffs. Thereafter judgment was entered in favor of plaintiffs and the defendants bring error.

At the trial, which was to a jury, the plaintiffs introduced evidence tending to prove the contract above mentioned, that the contract had been performed in part by the plaintiffs, and that its further performance had been prevented by the act of the defendants. On cross-examination a witness for the plaintiffs testified that plaintiffs "never had any understanding with either Mr. or Mrs. Pace that they should be paid by the day, and the only understanding and agreement was that they should get their pay out of the crop that was raised on the place."

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Over the objections of the defendants the plaintiffs testified that the customary and prevailing wage for men doing such work as the plaintiffs did, in that vicinity, during that period of time, was $1.50 a day and board or $2.00 a day and board yourself."

The admission of this evidence, that the usual and customary wages paid for labor was $2.00 per day, is assigned as error.

The plaintiffs, defendants in error here, contend that since they have performed, in part, a specific agreement and further performance has been prevented by the act of the defendants, they, the plaintiffs, are entitled to recover of and from the defendants what the former's services were reasonably worth, measured by the prevailing rate of wages paid for similar work.

If the contract between plaintiffs and defendants was one of employment, or if by reason of the contract the plaintiffs were servants of the defendants, the theory upon which the case was conducted, and the rule now contended for, by the plaintiffs would be correct.

We cannot, however, regard the contract as one of employment. The parties were not, among themselves, masters and servants. The contract was one for the cultivation of land for a share of the crops. There is much diversity in the decisions of the courts as to the nature of such contracts and the measure of damages for breach of the same. In so far as the intention of the parties is concerned, the record in this case is unfavorable to the conclusion that the parties regarded the contract as one of employment. In the complaint the plaintiffs refer to the contract as a "lease" and "agreement of lease," and that they worked "under the terms of said lease." T. B. Beckett, one of the plaintiffs, testified that the land of the Paces was "leased." In considering the authorities, it seems that the most satisfactory view of such contracts as the one in question is that they are special, partaking somewhat of the nature of an adventure, entitling the party to a chance in the profits or benefits derivable therefrom. This view more nearly

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carries out the intention of the parties than any other. Such appears to be the nature of the contract between the parties that is the subject of this controversy. It was not a contract of employment. The plaintiffs were not servants of the defendants, either before or after the breach of the agreement by defendants. Reasons for this conclusion can be found in the case of *Bowers v. Graves & Vinton Co.*, 8 S. D. 385, 66 N. W. 931, from which we quote extensively later in this opinion. Other authorities in support of this view are: *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *James v. James*, 151 Wis. 78, 137 N. W. 1094; and *Cull v. San Francisco, etc., Land Co.*, 124 Calif. 591, 57 Pac. 456.

The defendants in error, plaintiffs below, in their brief say: "Under the decisions, as we read them, this was what is termed a 'cropping contract,' rather than a lease." Assuming that this statement is correct, it is not sufficient to support plaintiffs' theory that they could recover as for work and labor and that the evidence as to the prevailing rate of wages was admissible. The syllabus in 124 Calif. 591, in the case of *Cull v. San Francisco, etc., Land Co., supra*, reads as follows:

"A contract for the cropping of land upon shares does not include any element of a contract of employment; and there being no original employment by the terms of the contract, the cropper does not become a servant or employe by the breach thereof on the part of the owner of the land, and he cannot, on account of such breach, maintain an action upon a *quantum meruit* for the value of his services."

In the case of *Bowers v. Graves & Vinton Co., supra*, the same contention was made by a cropper, and the same relief sought, as that by the plaintiffs in the instant case, except that in the Bowers case the compensation claimed was a certain sum per acre. The farming or cropping contract involved in that case was very similar to the one in the case at bar, under the terms of which each party was to receive a share of the crops raised. The case was brought on the same theory as that on which the plaintiffs

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here have proceeded. The supreme court of South Dakota in the case just mentioned, among other things, said:

"The contract in this case belongs to that class of contracts for the cultivation of lands for a share of the crop that has given rise to much diversity in the decisions of the courts as to their nature and the measure of damages for a breach of the same. Some courts have been inclined to regard them in the nature of leases and to apply to them the rules applicable to breaches of contracts for leasing. Other courts have treated them as more in the nature of contracts for hire, the services to be paid for by a share of the crop. *Porter v. Chandler*, 27 Minn. 301, 7 N. W. 142; Am. & Eng. Enc. Law, pp. 897-899. Much of this diversity in the decisions has undoubtedly arisen by reason of the various stipulations in such contracts, in which slight changes in their terms have produced important differences in the views of courts as to the character of the contracts and the rules that should govern the measure of damages for breach of the same. *Warner v. Abbey*, 112 Mass. 355. In the early case of *Walker v. Fitts*, 24 Pick. 191, the supreme court of Massachusetts, in discussing a contract quite similar to the one before us, says: 'The occupant was not the mere servant of the owner. It was not a contract of hire, in which the laborer was to receive a portion of the crop as a compensation for his services. It was not a mere license to enter upon and cultivate the farm, nor a tenancy at will. He had a right to occupy, and an interest in the land. * * * The owner could not exclude him, nor maintain an action against him for anything done in pursuance of the agreement. But what the precise nature and character of his interest was, is not so easily determined.' And the court of appeals of New York, in the well-considered case of *Taylor v. Bradley*, 39 N. Y. 129, take the same view of contracts of this class, and hold that such contracts are special, and partake somewhat of the nature of an adventure, entitling the party to a chance in the profits or benefits derivable therefrom. This seems to us to be the most satisfactory view of such contracts, and

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one that more nearly carries out the intention of the parties than any other. That such is the nature of the contract before us seems clear from its terms. * * * He (the cropper) is subject to no direction of the defendant, other than to sow and plant said land in such crops as the defendant should direct. He is not subject to the orders, nor under the control, of the defendant, in the performance of his labors. He is in fact, his own master, and master of such help as he might employ. His services are not to be paid for by any definite or fixed standard, but depend entirely upon the nature and value of the crop. If the season is a favorable one, his remuneration may be large; if unfavorable, his crop may be light, and his remuneration or profits small; and the remuneration of the owner of the land for its use is subject to the same contingencies. In entering into the contract therefore, the plaintiff must be presumed to have taken into consideration all these circumstances, and elected to make the venture, and take the chances of success or failure.

"* * * But the plaintiff cannot claim that, by reason of the breach, the relations of the parties to each other have been changed. If the plaintiff was not a servant or employe of the defendant under the terms of the contract, he does not become such by the breach thereof.

"* * * The defendant had neither directly nor indirectly assumed the payment for any such services, as such, * * *."

The court in *Bowers v. Graves & Vinton Co., supra,* overruled the plaintiff's contention hereinbefore mentioned.

In the case of *Rockwell Stock Co. v. Castroni,* 6 Colo. App. 521, 42 Pac. 180, the plaintiff was prevented by defendant from carrying out a partnership agreement to raise hens, chickens and eggs for market, after plaintiff has spent about three months' time in acting under the agreement. The plaintiff in that case brought an action to recover, among other items, $100.00 for one hundred days lost time, at $1.00 a day. As in the case at bar, and also as in the Bowers case in South Dakota, the remuneration of the

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plaintiff under the contract in the Castroni case depended on the profits of the enterprise, and the services were "not to be paid for by any definite or fixed standard" and the defendant had not assumed the payment for such services, as such. In the Castroni case the plaintiff at the trial was permitted, over the objections of the defendant, to offer evidence in regard to the item of $100.00 for one hundred days time lost. The Colorado Court of Appeals in reversing the case said:

"The chief trouble is the case was not correctly conceived and it was tried on a wholly erroneous hypothesis. * * * when the company refused to carry (the agreement) out it was guilty of a breach of contract for which it must respond in damages.

* * * * * *

"The damages, however, do not take the form of the *per diem* value of the labor of the person against whom the wrong was committed. The court clearly erred in admitting proof concerning the value of her time for one hundred days."

The opinion in the case of *Smart v. Burquoin*, 51 Wash. 274, 66 Pac. 666, indicates that the court there took a view similar to that entertained by the court in the case of *Bowers v. Graves & Vinton Co., supra.* The court said:

"In this case the pleadings show that appellants seek to recover upon a *quantum meruit* the value of their plowing, while holding under a lease with the rent reserved in kind, with no promise or obligation whatever upon the respondent to pay in money for any work done in tilling the land. * * * If they (the appellants) were evicted, they have mistaken their remedy."

The claim of the plaintiffs in the case at bar for a *per diem* compensation for their services is quite analogous to that of the plaintiff in the case of *Rockwell Stock Co. v. Castroni, supra,* and as said in that case, "the court erred in admitting testimony concerning what should constitute the measure of damages." In all the cases cited herein and in the case at bar there was no agreement to pay in money

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for any work done under the contract. As in the case of *Smart v. Burquoin, supra,* the plaintiffs "have mistaken their remedy," and as in the Castroni case, the plaintiffs proceeded "on a wholly erroneous hypothesis."

Under the principles laid down in the authorities quoted, it was error for the trial court to overrule defendants' objections to the admission of testimony concerning the prevailing rate of wages for men doing the work which plaintiffs did under the contract in question, and the value of plaintiffs' services measured by such *per diem* rate.

It is not necessary to consider other assignments of error. The defendants in error in their answer brief raise some objections to the record on error. These objections are made for the first time in the answer brief and after plaintiffs in error had prepared and filed their abstract of record and their brief. Under these circumstances the objections must be deemed to have been made too late. *Lavelle v. Julesburg,* 49 Colo. 290, 302.

For the reasons hereinbefore stated, the judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

No. 8765.

STARK v. ROGERS.

Decided December 3, 1917.

Action to enforce specific performance of a contract for the sale of property purported to have been executed by a real estate broker under authority from the owner. Judgment of dismissal.

Affirmed.

1. REAL ESTATE BROKERS—*Contract by, to convey title.* A contract with a real estate broker to sell, confers upon him authority to produce a purchaser able, ready and willing to buy upon terms fixed by the owner, but gives him no power to bind or convey title unless there is a specific written agreement to that effect.

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Error to the District Court of Park County, Hon. John H. Denison, Judge.

Mr. JOHN R. SMITH, Mr. H. B. WOODS, for plaintiff in error.

Mr. I. S. SMITH, Mr. JAMES A. ORR, for defendant in error.

MR. JUSTICE GARRIGUES delivered the opinion of the court.

STATEMENT.

STARK brought this action as plaintiff against Rogers as defendant in the court below to enforce specific performance of a contract to convey certain real estate and personal property. The contract is signed by A. L. Patton as agent for the owner, and the controversy turns on whether Patton was authorized in writing to enter into a contract binding Rogers to convey the title. Rogers owned the "63" ranch with water rights near Hartzell in Park county, together with one thousand head of branded cattle, more or less, harness, saddles, wagons, farm implements, household furniture, tools, blacksmith shop, cows and horses, all of which he desired to sell. The evidence shows that Patton, a real estate broker living at Colorado Springs, heard the place was for sale and went up in September, 1913, to see Rogers about a sales agency. Rogers told him the place was for sale and after visiting the ranch, they talked over the terms and conditions and Patton was given an oral agency which in substance was, that if he found a purchaser, Rogers would sell for $50,000.00, the whole of the purchase price to be paid in cash, that is, there were to be no deferred payments or time given, and he agreed to give Patton $1,000.00 commission for his trouble. After returning to Colorado Springs, Patton concluded that for his protection, he should have an exclusive agency and so prepared such an agreement, also a prospectus which he mailed September 4th, with a letter to Rogers. In the letter he

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stated: We are sending you herewith a copy of the prospectus we have issued, describing the 63 ranch and hope you will approve of it. We have submitted it to a good many people. In Denver, we have offered the property to a Mr. Ridenour, who is an agent, and in case he should find a buyer before we do, he of course would do the business through us. This gentleman asked us today what position we are in, in case he should secure a buyer, to not let the deal get away from us. We firmly believe we will sell the place very soon, but as our efforts are so scattered, we do feel that we should have at least an agreement of exclusive sale while we are dealing with the people mentioned as well as others that may turn up at any time. Hope you will see the matter as we do and return the brief agreement we are sending herewith.

The agreement mentioned, is as follows:

"AGREEMENT.

I hereby employ Mr. A. L. Patton, doing business as the Patton Realty Co. of Colorado Springs, Colo., exclusive agent to sell the property known as the '63' ranch, together with all cattle, horses, implements, land and water rights, for the sum of $50,000 net to me. This employment to remain in force while certain people whose names are mentioned in a letter of this date are being dealt with, or with others who may become interested within a reasonable time.

Owner."

The prospectus described the ranch and personal property and among other things stated that Rogers desired to sell and had placed it all in the hands of the Patton Realty Company of Colorado Springs, for sale.

September 28, Rogers replied as follows:

"Howbert, Colo.,
Sept. 28th, 1913.

Mr. A. L. Patton,
Colo. Springs.

Dear Sir:

I recd. the prospectus describing the 63 ranch. Everything seems to be all right except the agreement for me to

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sign, giving you the exclusive right to sell the property. I don't feel like signing this agreement as there are several parties after me now to buy the property. If you are the first one to find a buyer who wants the property it would be all right. If a man comes to me with the ready cash to buy the property I want to be at liberty to sell my own property without asking any questions of any one.

If you can sell the property I will do just as I said I would by you. I never go back on any thing I say.

Yours very truly,

JOSEPH ROGERS."

This letter is the basis of plaintiff's cause of action and he relies upon it as Patton's written authority to make a sales contract binding Rogers to convey the title.

February 24, 1914, Patton wrote Rogers that he had found a purchaser who would pay $60,000.00 cash after an inspection of the property and an examination of the abstracts. In this letter he states:

"I priced the place at $60,000 and Mr. Stark, who is evidently acting for some one else, has accepted it at that price.

Mr. Stark has agreed to pay $2,000 to show his intention to complete the payments when title is examined, which of course, he would have a right to do, and in the meantime to look the stock over to assure himself that everything is just as represented which, of course, he knows in advance is positively described as your reputation for integrity is such that no man would think of questioning it. But this is merely a matter of business, which every man expects and really desires.

My idea is, in view of the heavy snow, that it will take several weeks to fully turn over the place, but a substantial payment as is offered will logically complete the deal, except the preliminaries which will naturally follow, and I hope to hear from you right away so myself and Mr. Stark may come up to your place soon and make this payment, and talk the whole matter over as man to man.

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We are to accept a payment of $2,000 to apply on purchase price, bal. to be paid as soon as the weather will permit an inspection of the property; and in case they fail to complete the payments, we are to keep the money so paid. This kind of an arrangement is simply a cash sale arranged to suit the bad weather, which I am sure you will appreciate as well as to appreciate that such an offer comes from those who are not triflers; for a substantial cash payment, such as is proposed, is sufficient evidence of good faith. I personally feel confident that you will sanction my ideas, and see that in every way I have had your welfare in mind, particularly when the bad weather is considered."

March 3, 1914, Patton telegraphed Rogers that himself and two others would be up on the noon train Thursday to see the place and wanted him to go with them if convenient. That they were prepared to make payment as per his letter. To which Rogers replied, that the road to the "63" ranch was impassable and not to come.

March 10, 1914, Patton prepared the sales contract upon which this suit was afterwards brought, but it was not signed at that time. Sometime between the 10th and the 18th, Patton and Stark visited the cattle ranch, Stark inspected the cattle and after they returned to Colorado Springs, the sales contract was signed and Stark paid Patton $2,000 in cash on the contract for which he took a receipt as follows:

"Colorado Springs, Colorado,
March 18, 1914.

Received of E. R. Stark the sum of two thousand ($2,000) the same being the payment of $2,000 provided for in the contract for the "63" ranch and personal property going with same, the same being located in South Park.

(Signed) A. L. PATTON,
Agent for Joseph Rogers,
Owner."

The sales contract is as follows:

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"A CONTRACT.

Colorado Springs, Colorado,
March 10th, 1914.

This contract entered into this 10th day of March, 1914, between A. L. Patton, agent for Joseph Rogers hereinafter designated as the party of the first part and E. R. Stark hereinafter designated as the party of the second part.

WITNESSETH: The party of the first part agrees to sell the property with all water rights, cattle, horses and other chattels known as The Sixty Three (63) Ranch as described in a prospectus; a copy of which is herewith attached for the total sum of $60,000.00 Sixty Thousand Dollars. Said total sum is to be paid in cash in the manner hereafter set forth; $2,000.00 Two Thousand Dollars on the execution and delivery of this contract and the balance $58,000.00 Fifty-eight Thousand Dollars as soon as the party of the second part or his agents or assigns may inspect and invoice the cattle and horses on said ranch, provided however said inspection must be made and total payment completed on or before sixty days from this date. It is understood and agreed that the time here mentioned is given on account of weather conditions only and is not intended to extend time except in case of bad weather.

It is further understood and agreed that the party of the second part is to satisfy himself as to the number of cattle which is one thousand more or less and to consider Joseph Rogers released in every way in case the count may not be satisfactory in the future. Passing of title shall be considered as a release of any responsibility whatever.

Party of the first part as agent for said Rogers agrees to deliver good merchantable title to all pertaining to said ranch and to place papers in the hands of party of the second part for his inspection as soon as the first payment heretofore mentioned is paid.

It is further agreed that time is the essence of this agreement and that failure on the part of the second party to complete payment as above set forth shall be and is a for-

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feiture of the amount already paid and may be retained by said Rogers as liquidated damages. Except that in case the cattle may not all be found or that the count may appear as being short of one thousand head all told then party of the second part may demand the return of the two thousand dollars above mentioned when he has shown conclusively that the number is short of one thousand but he nor his successors or assigns may demand such return of money for any other reason. In case count does appear to be short and party of the second part accepts and settles for said property then the act of his acceptance and payment shall be considered as a final release of said Joseph Rogers.

A. L. PATTON (Seal)
Agent for Owner.
E. R. STARK (Seal)

The following, copied from the prospectus, was endorsed on the contract:

"This description of the "63" ranch belonging to Joseph Rogers, of Howbert, Colorado, is an exact carbon copy, 'In fact the same identical copy,' which was submitted to Mr. Rogers by me for his approval and returned to me with his letter of September 28, 1913, and is hereby made a part of my agreement with E. R. Stark for the sale of said property. In case this agreement is finally consummated by said Stark, this description is to be considered the basis of sale.

A. L. PATTON, Agent."

The next day, March 19, Patton sent Rogers the $2,000 by letter, in which he said:

I am very pleased to send you herewith cashier's check received yesterday as part payment on the ranch. This payment is enough to show that these people are in earnest and are ready to take over the property just as soon as you advise that they can see the bulk of the cattle and make some kind of a count that will be reasonably satisfactory. They are anxious to get it through as soon as possible.

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* * * This manner of dealing with the affair, I am sure, is in accordance with your wish as well as positive instructions to me; and this leaves you clear and absolutely released forever when place is turned over, which will be completed just as soon as you advise me so I may notify Mr. Stark that the roads are fit to get over. I would come personally and bring you this check, but some other business will detain me for a day or so, but will come up soon and talk with you, and at that time can get papers for Mr. Stark's examinations."

To which Rogers replied:

"Howbert, Colo.,
March 22, 1914.

Mr. A. L. Patton,
Colorado Springs, Colo.
Dear Sir:

Your letter of the 29th with enclosures was recd. in due time. In reply will say I will return all enclosures to you, including check for $2,000. I don't want any money on my property until it is sold. When my "63" ranch and property is sold I will give a warranty deed for the whole of it, providing that the price agreed is spot cash. My price in the "63" ranch and property now is $62,000; this will be my price in the property for 2 weeks from today. Any time in two weeks from today $62,000 spot cash will buy the "63" property, cattle and ranch.

Yours truly,
JOSEPH ROGERS."

March 27th, Patton wrote:

"I was very much surprised to receive your letter returning the check for $2,000. You certainly authorized me to sell the ranch, cattle, horses, etc., for $50,000; I have done that and more. The sale was made practically on a cash basis. You could not expect that any one would place the entire purchase price in your hands without an opportunity to inspect the property and examine the title. I was ready with my party to go to the ranch to make this examination.

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My letter of February 24th advised you fully of the negotiations which I had carried on with Mr. Stark, the price I had given and the terms of sale. To that you made no reply, nor did you in any way indicate to me that you did not desire to sell the property at the price and on the terms mentioned. On the contrary, after the telegram to you of March 3rd you replied on March 4th: 'Road Haver to "63" impassable. Don't come up now.'

From which I inferred, as I had a right to, that everything was satisfactory, except that it was impractical to visit the ranch at that time.

I have kept you fully advised of each step as it was taken. The parties with whom I have contracted in your behalf have shown their good faith. They are now, and at all times have been, ready, willing and able to complete the purchase. They insist upon your carrying out your part of the contract.

I also expect compensation for my services.

I am sure that when you consider the whole situation you will realize that you have made a mistake. I therefore suggest that you write me at once, fully ratifying the contract which I have made in your behalf, and indicating your willingness to do your part towards its completion.

I hold the check for $2,000 subject to your order."

The evidence shows that plaintiff was able, ready, willing and desirous to go ahead and complete the sale that Patton had negotiated. At the close of plaintiff's evidence the court on motion of defendant entered a judgment of dismissal and plaintiff brings the case here on error.

OPINION.

1. Whatever may be the rule elsewhere, it is held by us that where real estate is placed in the hands of an agent with instructions, either orally or in writing, to sell, it confers authority upon the agent to produce a purchaser able, ready and willing to buy upon the terms offered by the owner, but gives the agent no authority over the title unless he is specifically authorized in writing to bind the title or

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to enter into a contract binding the owner to convey the title. *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817; *Johnson v. Lennox*, 55 Colo. 125, 133 Pac. 744; *Springer v. City Bank*, 59 Colo. 376, 149 Pac. 253, Ann. Cas. 1917A, 520. In the case of *Buckingham v. Harris, supra*, it is held that the employment of an agent to sell real estate, does not vest him with power over the title and although he produces a purchaser ready, able and willing to buy the property on the owner's terms, still the owner may decline to convey or complete the sale. In *Johnson v. Lennox, supra*, it is held that where the purchaser brings suit upon a contract executed by an agent, to convey real estate, the burden is upon the plaintiff to show that the agent was not only authorized to negotiate the sale of the land, but that he was given authority in writing to enter into a contract with the purchaser binding the owner to convey upon the terms expressed in the sales contract. In *Springer v. City Bank, supra*, the agent was authorized in writing to procure a purchaser and sell the land; held, that this only authorized him to find a purchaser able, ready and willing to buy upon the owner's terms, and did not give the agent authority over the title or to enter into a contract of sale with the purchaser binding the owner to convey the title. In the opinion at page 381, it is said:

"It is a general rule that where real estate is placed in the hands of an agent, either verbally or by written instrument, to find a purchaser, or with instructions in general terms to sell, the agent is not thereby authorized to enter into a contract of sale binding upon the owner, as in either instance the agent's authority extends only to finding a purchaser acceptable to the owner, and to negotiating a sale generally between such purchaser and the owner. The use of the words 'to sell' in such a case is held to mean no more than to authorize the agent to find a purchaser. This doctrine is firmly settled in this jurisdiction."

We think the lower court entered the proper judgment, and it will be affirmed.

Chief Justice White and Mr. Justice Scott concur.

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No. 8780.

STEWART v. BRECKENRIDGE, ET AL.

Decided December 3, 1917. Rehearing denied January 7, 1918.

Action to foreclose mechanics' lien. Judgment for plaintiffs.

Affirmed.

1. EQUITY—*Trial—Verdict of Jury.* In the trial of an equity case, the verdict of a jury is only advisory to the court, and error can not be assigned on instructions given or refused.

2. CONTRACT—*Building—Authority of Architect.* Where a building contract provides the architect shall determine the "construction and meaning of the drawings and specifications", he is empowered to decide whether drawings or specifications shall govern in case of conflict between them.

3. *Building Contract—Rights of Owner.* In the construction of a building under contract, there must be a substantial compliance only, with its terms, and deviations or omissions not due to bad faith, which do not impair the structure as a whole and which can be conveniently remedied, do not justify a claim of non-compliance with the contract.

4. *Building Contract—Waiver.* Construction of a part of a building which has been approved by the owner or architect, expressly or by implication, is not open to objection by them afterwards, so as to defeat a suit on the contract.

5. APPEAL AND ERROR—*Findings of Fact.* Findings of fact by the trial court, which are supported by the evidence, will not be disturbed on review.

Error to the District Court of Pueblo County, Hon. J. E. Rizer, Judge.

Mr. M. J. GALLIGAN, for plaintiff in error.

Messrs. HARTMAN & BALLREICH, for defendants in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

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THE defendants in error obtained a judgment against the plaintiff in error for a balance due on a contract for the building of a house, and she brings the case here for review.

The defense was that the work had not been done according to the contract, and that the final certificate by the architect was given after he had been discharged.

The action was to foreclose a mechanic's lien, and the court called a jury to try the issues, which returned a verdict for the amount claimed. The court adopted the verdict, found the plaintiffs entitled to a lien, and entered judgment accordingly.

Plaintiff in error contends that the evidence was insufficient to justify the verdict and judgment, and that there was error in the instructions.

Since in this case the verdict was only advisory, error cannot be assigned on the instructions, either given or refused. *Danielson v. Gude,* 11 Colo. 87, 17 Pac. 283; *Kellogg v. Kellogg,* 21 Colo. 181, 40 Pac. 358, 16 Cyc. 422.

It might be said, however, that the instructions amount to findings of law, and hence, if they did not announce correct rules of law, it must be held that the court did not properly apply the law to the facts.

The principal objection made to the instructions is that they ignore the alleged discharge of the architect, and treat the final certificate as valid and binding. It might be necessary to determine the force of said certificate had the court treated it as determining the question of compliance with the contract; but, inasmuch as there was testimony upon every part of the work alleged to have been improperly done, or not done at all, as well as to the materials of which complaint was made, we cannot assume that the court's conclusions rested upon the certificate.

The other ground urged for reversal is that the evidence does not support the findings. It may be conceded, as claimed, that the contract gave the architect no authority to waive substantial compliance with it, or to make material changes in the form of or materials for the building; but it did authorize him to determine the "construction and

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meaning of the drawings and specifications." That, of course, empowered him to decide whether drawings or specifications should govern in case of conflict between them.

This makes his decision final as to the window sills, since there was as to these a conflict between the plans and the specifications, and this is true also as to the glass on the sides of the front door.

That the trees were not moved from the parking was admitted, but the testimony of the defendants in error that Mrs. Stewart directed them to leave the trees there is not disputed. Likewise it is not disputed that she selected the brick, which she now alleges are not according to the specifications. The witnesses best qualified to testify on the stone used agree that the foundations and the window sills are of the stone specified, and none of the witnesses to the contrary show any special knowledge on the subject. There is no testimony to support the charge that the floor in the attic is not as specified, but that it is so is established.

There was an abundance of evidence to support a finding that the plastering was not open to the objection made to it.

Counsel for plaintiff in error cites cases to support his petition as to the right of an owner to have his wishes, as expressed in a building contract, carried out; but the cases hold only that there must be a substantial compliance with the contract. *Idaho G. C. M. Co. v. Colo. Iron Works,* 49 Colo. 72, 111 Pac. 553; *Glacius v. Black,* 50 N. Y. 145, 10 Am. Rep. 449. Deviations and omissions, not due to bad faith, which do not impair the structure as a whole, which can be conveniently remedied, and which may be paid for by deductions from the contract price, do not justify a claim of noncompliance with the contract. *Pippy v. Winslow,* 62 Ore. 219, 125 Pac. 298.

That part of a building which has been approved by the owner or the architect, expressly or by implication, is not open to objection by them afterwards so as to defeat a suit on the contract. *Wildey v. School District,* 25 Mich. 419; *Ashland Lime Co. v. Shores,* 105 Wis. 122, 81 N. W. 136.

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The matters above mentioned appear to have been approved by the architect before his discharge.

The objection that Yale locks, required to be used in doors on the first floor, were not so used comes within the above named rule; they can be easily changed; and whether or not the use of other kinds of locks, which the evidence showed were as good as the Yale locks, entitled the defendant to a deduction from the contract price was for the trial court to determine.

The only other matter of which the defendant complained was that Oregon fir was used in the porch columns, instead of New Mexican pine. The architect testified that the plans were changed so as to make these columns longer and larger than those shown in the plans, and that, for this reason, he changed the material, the fir being, in his opinion, better than New Mexican pine.

Such a change does not come within the reason of the rule which protects the owner's right to have a building constructed according to his wishes, as expressed in a building contract, since it does not appear that the change affects the appearance of the columns, and there is evidence that the substituted wood is better for the purpose than the kind specified. Here, again, it was for the court to determine whether or not any deduction should be made on account of the change.

It appears that the installation of the elevator was the last work done under the contract, and that was accepted by the architect before his discharge; and, further, that all the other work had theretofore been approved by him. In view of this fact, and the abundant evidence to support the findings, we see no reason for rejecting them.

The judgment is accordingly affirmed.

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No. 8852.

ADAMS v. GUIRAUD.

Decided December 3, 1917.

Action for conversion of personal property. Judgment for plaintiff.

Reversed.

1. CONTRACT—*Rescission—Burden of proof.* One party to an executory contract, in the absence of fraud or special reason, can not rescind. To rescind by agreement, the agreement must be mutual and by all the necessary parties to the original contract. The burden of proving the agreement is upon the party alleging it.

2. *Contract of Sale—Essentials.* The necessary essentials of a valid contract of sale of cattle are: 1. Certainty as to parties; 2. Sufficient certainty as to property; 3. Price; 4. Time, place and manner of payment; 5. Time and place of delivery, if delivery be agreed upon.

3. INSTRUCTIONS—*Issues.* Instructions should confine the issues to the facts in the case, and should not contain conclusions or assumptions not warranted by the evidence.

Error to the District Court of the City and County of Denver, Hon. Granby Hillyer, Judge.

Messrs. ALLEN & WEBSTER, for plaintiff in error.

Mr. J. W. KELLEY, for defendant in error.

En banc.

MR. JUSTICE SCOTT delivered the opinion of the court.

THIS is an action brought in conversion. Briefly the facts are that in the spring of 1915, the plaintiff placed an order with defendant for the purchase of approximately 500 head of cattle. Thereafter defendant sold a lot of cattle undetermined in number, but thought at the time to number from 400 to 500 head, and known as the Pugh herd, then being on the ranches of the Pugh estate. This sale was to a partnership known as Smith & Hanks, and the

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sale was for the definite price of $62.50 per head. These cattle, the number of which was still undetermined and upon the said ranches, was purchased by the plaintiff through the agency of the defendant, at the fixed price of $65.00 per head. Later on these cattle with the exception hereinafter referred to, were sold by the plaintiff, the number still undetermined, and the cattle still running on the said ranches, for the sum of $67.50 per head.

It is contended by the defendant that prior to this latter sale, the plaintiff contracted to sell to the defendant 50 head of cattle, purchased by him, being of an inferior class and designated as "tail-enders", and that at the time of the sale to Gray & Cobb, the defendant was entitled under said contract of purchase, and upon payment on delivery to the said 50 head.

The plaintiff contends that this agreement of sale by him to the defendant was, prior to the sale of the entire lot, rescinded, and that therefore the plaintiff was entitled to receive the profit on the 50 head, being the difference between the sum of $55 to be paid under the agreement of purchase, and the sum of $67.50 received for all the cattle, or the total sum of $625. Both lots were sold at the same time and to the firm of Gray & Cobb.

In the complaint the plaintiff alleges that of the moneys received by the defendant for all cattle sold, the defendant fraudulently and wrongfully appropriated to his own use and benefit, the said sum of $625, which he has refused to pay over to the plaintiff, and also prayed for $1,000 as exemplary damages. The answer denied generally the allegations of the complaint as to the wrongful withholding of the money, and offered proof of the agreement with plaintiff, as a defense. None of the cattle were ever specifically selected, separated or counted out, until after the final sale to Gray & Cobb.

That such a contract was entered into between the plaintiff and defendant for the sale of 50 head of cattle at the fixed price of $55.00 per head is not disputed. Plaintiff admits the following letter:

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"Garo, Colo., May 29, 1915.

Mr. J. P. Adams,
Denver, Colo.

Friend Joe:

I think you can sell all of that bunch of cattle out at Stratton for $70.00 per head, as you get 50 dry cows at $55 per head, and I don't want to sell any more of these cattle for less than they cost me as the freight on the rest will make pretty high priced cattle for me. Now, get busy and sell 150 head of them besides the 50 head that you get, and if you can get a chance to sell all of them at $70.00 per head on cars at Stratton; cut loose and sell them. Now, get to work on them, and some of them, as there is sure to be a lot of cows and calves in the 150 head. I will be on hand the 13th so we can go to Stratton on the 14th. Now let me hear from you and sell this stuff so I won't lose money on them. I want to sell two hundred or all of them. Write soon and let me know, as I leave for Fountain about the 4th of June.

Yours very truly,
(Signed) H. L. GUIRAUD."

It appears that the defendant had negotiated a sale for the entire lot of cattle including the 50 head, and that thereupon and on the 11th day of June, 1915, he called the plaintiff over the telephone, and in a conversation, says he told the plaintiff that he had an offer on the entire lot of cattle at $67.50 per head; that the plaintiff replied that he thought that they ought to bring $70.00; that defendant said that he could only get $67.50, and that the plaintiff then authorized the defendant to sell the cattle at the price offered. The plaintiff admits this conversation, but says that in addition, he asked the defendant Adams, if the price was for all the cattle; and that Adams replied, "All of those cattle, they are all yours, I am out of it."

Mr. Gray, one of the firm purchasing the cattle, testifies that he held one receiver on the same phone, and overheard what both men said during the conversation, and that

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Adams did not say to plaintiff that "they are all yours, I am out of it." And that no such language was used in the conversation. Adams testifies that he did say that the question of price was up to the plaintiff. Also the defendant's bookkeeper testifies that he sat at the desk near the telephone and heard all that Adams said, and confirms the testimony of both Adams and Gray to the effect that Adams used no such language as that testified to by the plaintiff, to the effect that "they are all yours, I am out of it."

It is the plaintiff's contention that this language which he says Adams used at that time, constituted a rescission of the contract between plaintiff and defendant, and thus reinvested the title to the 50 head of cattle in himself. So that the agreement to sell the 50 head of cattle is conceded, and the matter to be determined in this respect is as to whether or not this alleged language of Adams and the acquiescence therein by the plaintiff, constituted a rescission of the contract. This appears clearly to have been the understanding of the court for in Instruction No. 3, the court states the issue as follows:

"Instruction No. 3. Plaintiff claims his agreement with J. P. Adams was to sell him fifty head of the poorer cattle, known as 'tail-enders,' at $55 a head, separation and delivery of said 50 head, to be made at a time when plaintiff was to receive the cattle bought by him, and that this sale was never carried out by either party, but was mutually rescinded, and all the 414 head sold together for $67.50, without any of the tail enders being taken out. The defendant claims these fifty cattle were to be sold to him and were sold to him without and regardless of any of these conditions."

It will be seen that Adams and the two witnesses who heard all that Adams said in the conversation, denied flatly that he used the language testified to by the plaintiff.

If we are to concede the testimony of plaintiff as being true as to the use of these general words, "they are all yours, I am out of it," yet, under all the facts and circumstances theretofore and then existing, this did not prove a

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rescission of the contract then existing between plaintiff and defendant. In this conversation, there was no specific reference to such contract, and no reason was suggested for rescinding the same. The 50 head of cattle included in the contract are not mentioned, nor is any reference made thereto.

Nothing is better settled than that one party to an executory contract, in the absence of fraud or a special reason, cannot rescind. To rescind by agreement, the agreement must be mutual, and by all the necessary parties to the original contract. Such rescission must be with the clear knowledge and understanding of the parties. The same degree of proof of rescission will be required as in case of proof of the contract alleged to have been rescinded. The burden to prove an agreement to rescind, is upon the party alleging it.

If we are to admit that Adams did use the language contended, what are the surrounding facts and circumstances which may tend to throw light upon the intent and meaning? There is no evidence of any act or desire upon the part of Adams to rescind his contract prior to that time nor afterward. Plaintiff still owned as finally determined, 364 head of cattle aside from the 50 head contracted to Adams, and for which the latter was acting as agent in the sale. It was the former number that plaintiff had to sell. The purpose of the telephone call was to learn whether or not plaintiff would accept the price offered for his cattle, not for the cattle which Adams held under his agreement. It was not necessary under that agreement, for Adams to ask plaintiff for consent to any price for which he should sell the cattle purchased under his contract. Naturally, without express declaration to the contrary, he could have in mind only, "All of plaintiff's cattle." It was under such circumstances, very natural for Adams to say, "the price is up to you", "they are your cattle", and even "I am out of it", without having the slightest intent or thought of referring to the 50 head, for which he had the agreement of purchase and sale to himself. In the absence of some proof

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of such intent and purpose on the part of Adams, it cannot be inferred from the expression said to have been used, he intended to or did, declare his contract rescinded. Clearly there was no sufficient proof of rescission.

It may be stated that the number of cattle taken by Gray & Cobb, was 414 head. It is clear that under the undisputed facts in this case plaintiff cannot recover in conversion. His right to recover at all depends wholly upon the validity of the contract as between himself and the plaintiff, and whether or not that contract was rescinded prior to the sale to Gray & Cobb.

It is further contended in the argument that this contract is void for the reasons (a) that the 50 head of cattle were not separated, counted out, nor identified, and (b) that the contract was within the statute of frauds. The jury was instructed upon this point as follows:

"Instruction No. 5. The jury is instructed that there is a difference between the sale of personal property and an agreement to sell; under a mere agreement to sell no title passes; but where parties have agreed upon the terms of sale and the precise property sold is identified and nothing remains to be done but to deliver it, and it appears from the evidence that the parties understood and intended the title to pass without actual delivery, then the title will pass without such delivery; but where anything remains to be done by way of selecting out or separating the property from other property of similar kind for the purpose of identifying the property sold, then no title will pass until the property has been so selected and identified.

Instruction 6. The court instructs you that in sales of personal property there must be a delivery of the property before the ownership passes from the seller to the buyer, that is to say, the mere agreement of one person to sell and the other to buy a certain number of a certain kind of cattle out of a herd made up of cattle with different grades and values at a certain price, does not constitute a sale of the animals until the ones to be taken are identified and distinguished in some way from the rest; and if you believe

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from the evidence that at no time did the plaintiff, or J. P. Adams, or either of them, identify the fifty head to be taken by Adams, then there was no sale of these fifty head and your verdict must be for the plaintiff."

These instructions were objected to by the defendant, who at the time tendered instructions, which were refused, the substance of which at least should have been given, to the extent of confining the issues to the facts in the case, and thus relieving them from the objectionable features. It is the qualification to Instruction No. 5 of which complaint is made, namely: "But where anything remains to be done by way of selecting out or separating the property from other property of a similar kind for the purpose of identifying the property sold, then no title will pass until the property has been so selected and identified."

Without instruction as to what constitutes a sufficient selection and identification, under the circumstances of the case, the jury must have construed this part of the instruction to require an actual physical separation. Such a separation was never made nor had in the case of the sale from plaintiff to defendant, nor in case of either of the sales preceding the last one, when the 414 head was cut out and delivered to the last purchaser. This qualification seems to nullify the preceding declaration, which declared "but where parties have agreed upon the terms of the sale, and the precise property sold is identified and nothing remains but to deliver it, and it appears from the evidence that the parties understood and intended the title to pass without actual delivery, then the title will pass without such delivery."

The question here is: Do the facts in this case make the sale valid under this declaration of the law? It is held to be the rule that the essentials of a contract of this character, necessary to its validity, are: First, certainty as to parties; second, sufficient certainty as to the property; third, the price; fourth, the time and place and manner of payment; fifth, time and place of delivery, if such delivery was agreed upon. Here we have the certainty as to

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parties; the certainty as to price; certainty as to the number of cattle, and testimony showing the time of delivery to be, when the herd were finally disposed of, and also that the time of payment was to be as of the time of delivery.

As to the identity of the property the plaintiff testifies:

"Q. When you looked at these cattle, did you notice any fifty? A. Yes, sir.

Q. That were worse than the others? A. Yes, sir.

Q. There were fifty that were markedly worse than the others? A. Yes, sir.

Q. Go on and describe to the jury how cattlemen who make such an agreement has to determine which are the tail-enders and which are not. A. A man goes into a herd of cattle, he can very easily tell the tail-enders, if he is used to cattle at all. * * * They go in and cut out the tail-end cattle or poor cattle, the cattle that do not look as well as the rest, and the old cattle, the cattle that are undersized."

The trial court understood and stated that the plaintiff's claim under the contract, was that there should be separation and delivery of 50 head so agreed to be sold, at the time of delivery. This being stated in instruction number three. In addition to this the plaintiff in his letter to Adams described the cattle which defendant was to receive, as "50 dry cows at $55 per head, of the bunch of dry cattle at Stratton." In our opinion the evidence is sufficient for identification to take the contract out of the statute of frauds.

In the very exhaustively considered case of *Darnell v. Lafferty*, 113 Mo. App. 282, 88 S. W. 784, the following memorandum was held to be sufficient both as to identity, and to take the contract out of the statute of frauds:

"Vandalia, Mo., June 11, 1903.

This is to certify that I, the undersigned, have this day bought of F. L. Darnell, ten head of cows and heifers to be weighed at Curryville, Mo., on August 11, 1903, with three per cent off at three and one-half cents per pound.

(Signed) MARTIN LAFFERTY."

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See also *Am. Iron and Steel Co. v. Midland Street Co.*, 101 Fed. 200; *Penniman v. Hartshorn*, 13 Mass. 87.

The court gave other instructions that had no place in the case, and which clearly tended to either mislead the jury, or to constitute positive error.

In Instruction No. 9, among other things, the court instructed the jury:

"The rescission and setting aside of a contract need not be evidenced by words; it may be by acts alone; and to ascertain whether they did so mutually rescind the contract, if you find there was a contract, you may take into consideration all the facts and circumstances shown by the evidence."

The plaintiff neither testified to nor relied on any act of defendant to prove a rescission. The sole reliance of the plaintiff was on the alleged words of defendant in the telephone conversation. The instructions should have been so confined.

In Instruction No. 10, the jury was instructed as follows:

"The court instructs the jury that when persons enter into a contract and one of the parties decides to rescind it and so informs the other, then the other party is no longer bound to carry out any part of the contract; the law does not require a useless act; and if you believe from the evidence that Adams informed the plaintiff, Guiraud, that he was no longer interested in purchasing fifty head of the cattle at $55 a head, then the plaintiff was not obliged to carry out any part of the agreement to sell, if there was an agreement, and was not bound to separate, or offer to separate, from the others the fifty head of cattle, or offer them to Adams, but might treat the animals as his own and sell them to whomever he pleased."

The first paragraph of this instruction is a clear misstatement of the law. Rescission requires the agreement of both parties as does the making of the contract, in whatever manner this may be done; but both must agree. There was no justification for the court in this instruction to say that if "Adams informed Guiraud, that he was no

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longer interested in purchasing fifty head of the cattle at $55 a head, then plaintiff was not required to carry out the contract." Plaintiff does not say that any such language was used.

The court thus expressly construed the alleged words of defendant, to constitute a specific rescission of the contract, when nowhere in terms, is the contract suggested or referred to.

We cannot enter upon a consideration of all the instructions complained of, but Instruction No. 12, was as follows:

"The law looks with suspicion on all transactions in which an agent secures a secret profit in a sale at the expense of his principal and it requires the agent to show to the satisfaction of the jury that the transaction was open and known to the principal and that the principal consented to the agent securing a profit from it. So if you believe from the evidence that not only The Western Live Stock Commission Company, but also the defendant J. P. Adams, was an agent of the plaintiff in the sale of these cattle, and that Adams, unknown to the plaintiff, and not in good faith, led plaintiff into a transaction whereby Adams could secure a profit at plaintiff's expense on fifty head of the cattle sold to Gray & Company, then, in such case, your verdict must be for the plaintiff as an agent must act solely in the principal's interest unless his profit is made with the principal's consent."

This instruction was highly prejudicial. There is no evidence of a secret profit, and no such claim in the case. The claim is based upon the alleged rescission of a contract. There was no question of agency involved in the particular agreement. There was no testimony to indicate that "Adams, unknown to plaintiff, and not in good faith led plaintiff into a transaction whereby Adams could secure a profit at plaintiff's expense."

The agreement of sale between plaintiff and defendant was made about two weeks before the final sale to Gray & Cobb, and before it was known to whom or at what price the remainder of the cattle were to be sold, and no restric-

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tions as to whom, when, or at what price Adams should sell the fifty head, or that he should sell them at all. The only questions possibly involved in this suit are whether or not the contract was valid, and if so, was it rescinded.

The judgment is reversed.

No. 8892.

DEGGE v. BAXTER, TRUSTEE.

Decided December 3, 1917. Rehearing denied January 7, 1918.

Action on judgment of a foreign state. Judgment for plaintiff.

Affirmed.

1. JUDGMENT—*Res judicata.* Plaintiff obtained judgment against defendant in Virginia, upon which another judgment was granted in the District of Columbia. In an action upon the latter judgment, upon review, *held*, that the question of jurisdiction of the Virginia court, having been litigated and determined by the District of Columbia court, which admittedly had jurisdiction, could not again be tried.

2. *Foreign State.* The judgment of a foreign state having jurisdiction, in the absence of fraud, is entitled to full faith and credit in the courts of this state.

Error to the District Court of the City and County of Denver, Hon. John A. Perry, Judge.

Mr. O. A. ERDMAN, for plaintiff in error.

Messrs. DANA & BLOUNT, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error had judgment against the plaintiff in error in an action on a judgment rendered in the Supreme Court of the District of Columbia; and the cause is here on error.

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The defense, as disclosed by the answer, is that the judgment sued on was rendered in an action on a judgment recovered "in a Virginia court, upon a false and fraudulent declaration", and which was alleged to have been "procured in the absence of the defendant, by default, without the knowledge of the defendant, and on which no writ, summons or other process was ever served upon the defendant in the suit."

The record contains a part of the record in the District of Columbia case, in which appear the writ and the return in the Virginia case. It there appears that the writ was served personally upon the wife of defendant Degge, she being a defendant, and upon him by leaving a copy of the writ with her at the family residence.

The Court of Appeals of the District of Columbia, in *Degge v. Baxter*, 41 App. D. C. 169, held that the Virginia court had jurisdiction, and that it would not consider matters which might have been presented in the Virginia courts.

No claim is made that the District of Columbia court did not have jurisdiction, and it is the judgment of that court and not that of the Virginia court which was the basis of the action under review. It seems that the plaintiff in error, the defendant in that action, raised the objection that the judgment there sued on was rendered by a court which did not have jurisdiction. That question was decided against him by a court admitted to have jurisdiction to determine it. He cannot now try that issue again in an action on the judgment rendered in that suit. The trial court properly struck out so much of the answer as recited the grounds of objection to the judgment in the Virginia case. There is no allegation of fraud in the procuring of the judgment on which suit is brought, and it is entitled to full faith and credit in the courts of this state.

We have considered the other errors assigned, and find no merit in them. The judgment is affirmed.

Mr. Justice Hill and Mr. Justice Scott concur.

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No. 8894.

THE PEOPLE v. HOPPER.

Decided December 3, 1917.

Criminal action for assault with intent to commit a bodily injury with an automobile. Directed verdict of not guilty.

Reversed.

1. CRIMINAL LAW—*Intent—Directed Verdict.* A verdict of not guilty is properly directed under an information charging an assault with intent to commit a bodily injury, where the evidence shows no specific intent to commit such an assault; intent being an essential element of the crime.

2. *Assault to do bodily harm—Included offense.* Under a charge of aggravated assault, the jury may find that the assault was committed without the aggravated circumstances, and return a verdict of guilty of simple assault.

3. *Automobiles—Assault and battery.* The law with reference to assault and battery in automobile cases, summarized.

4. AUTOMOBILES—*Violation of City Ordinance.* The fact that an automobile driver violated a city ordinance would not alone make him guilty of an assault upon a person injured in a collision between his car and another; but the fact that an ordinance was being violated, is proper evidence going to the question of negligence.

5. CRIMINAL LAW—*Information—Assault and Battery.* A person can not be convicted of a battery under an information alleging an assault only, no battery being charged.

6. *Trial—Question for the Jury.* In the trial of a criminal case under an information charging assault to commit bodily harm, where there is some evidence of such negligence as might make the defendant guilty of simple assault, that question should be submitted to the jury, notwithstanding there could be no conviction of the major offense, owing to the absence of proof of intent.

Error to the District Court of the City and County of Denver, Hon. William D. Wright, Judge.

Mr. FRED FARRAR, Attorney General, Mr. W. B. MORGAN, Assistant, for The People.

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No appearance for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THE writ of error in this case is prosecuted on behalf of the people to review a decision of the trial court in directing a verdict of not guilty. Authority for a review of the decision is found in section 1997, R. S. 1908, section 2124, Mills. Ann. Sts., which provides, *inter alia*, that "writs of error shall lie on behalf of the state, or the people, to review decisions of the trial court in any criminal case upon questions of law arising upon the trial."

This is a criminal case in which, after both the people and the defendant rested, upon motion of defendant the trial court directed the jury to find the defendant not guilty.

The information which was filed against the defendant below, omitting formal parts, reads as follows:

"That W. J. Hopper, * * * with a deadly weapon, to-wit, an automobile which he the said W. J. Hopper then and there had and held, then and there unlawfully, wilfully and maliciously did make an assault on one Frank W. Beard, with intent then and there unlawfully, wilfully and maliciously to commit a bodily injury upon the person of the said Frank W. Beard, no considerable provocation then and there appearing for the said assault and the circumstances thereof then and there showing an abandoned and malignant heart in him the said W. J. Hopper." The information was substantially in the language of the statute, section 1658 R. S. 1908, section 1786 Mills Ann. Sts., on which it was based, so far as such statute defines the particular kind of assault here charged.

It is not necessary in the present case to determine whether or not an automobile is, or under some circumstances may be "a deadly weapon, instrument or other thing" referred to in the statute in question. A verdict of not guilty, so far as the particular offense charged in the information is concerned, was properly directed for the reason that there was, according to the evidence, no specific

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intent on the part of the defendant "to commit a bodily injury upon the person of the said Frank W. Beard." Under the statute on which the information was drawn, the intent therein mentioned is an essential element of the offense.

In the case of *State v. Potello*, 42 Utah 396, 132 Pac. 14, the court had under consideration a statute very similar to ours, the statute having reference to assaults "with intent to do bodily harm." The court in the opinion says: "All the cases and text-writers seem to be of one accord that in such a charge as here the intent to do bodily harm is the very essence of the offense, and that it must be proved as alleged." To the same effect is the case of *In re Burns*, 113 Fed. 987. It is said in 5 C. J. 736 that where "the statute provides that the weapon must be used with a specific intent, such intent is an essential element of the offense." See also 3 Cyc. 1030; 2 Am. & Eng. Enc. Law, p. 965. It has been held, however, that the intent need not be a specific intent to assault the prosecuting witness, or to inflict the particular kind of injury which resulted. 3 Cyc. 1030. The evidence in the case at bar disclosed no intent to injure any person or to inflict any particular injury.

The mere fact, however, that there was no evidence of the required *specific* intent whereby defendant would be guilty of the precise offense charged in the information, would not justify the court in discharging the defendant. The defendant might still be guilty of simple assault. An indictment or information for assault to do bodily harm includes a simple assault. 22 Cyc. 473. In a charge of aggravated assault the jury may find that an assault was committed without the aggravating circumstances and return a verdict of conviction of simple assault. 2 R. C. L. Sec. 52, p. 571.

Upon the trial of this case there was some evidence introduced which made it the duty of the trial court to submit to the jury, under proper instructions, the question of defendant's guilt of simple assault. There was testimony

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that the defendant was driving an automobile down a very much traveled street at a rate of from 45 to 50 miles per hour, a speed greatly in excess of that permitted by the speed ordinance of the city of Denver and in violation of such ordinance; that while so driving and when crossing an intersecting street the defendant's machine struck with great force the side of an automobile which was being driven along such intersecting street, whereby the car struck was "smashed all to pieces" and both cars turned "end for end"; that the collision occurred in an old settled part of the city, and the defendant while so driving the car "was expecting to find anyone coming out from those dark streets", it being about 11:25 P. M. on a dark, dusty and hazy night; that the defendant's car was in first class condition, under his control, and the brakes were in perfect condition; that as a result of the collision one of the occupants of defendant's car was thrown about fifteen feet in the air, and that the driver of the car struck by defendant's automobile was severely injured.

There was no evidence that the defendant had a specific intent to injure any person in any manner, but this intent was not necessary to make out the offense of assault. The general rule with reference to what is the equivalent of criminal intent under these circumstances is thus stated in section 204, Clark & Marshall, Law of Crimes (2nd ed.):

"While there is very little authority on the question, there seems to be no good reason to doubt that a person may be guilty of criminal assault and battery if he intentionally does an act which by reason of its wanton and grossly negligent character, exposes another to personal injury, and does in fact cause such injury."

See also *Commonwealth v. Hawkins*, 157 Mass. 551, 32 N. E. 862. In 1 Bishop's New Crim. Law, section 313, the author says:

"There is little distinction except in degree between a will to do a wrongful thing and an indifference whether it is done or not. Therefore carelessness is criminal, and

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within limits supplies the place of an affirmative criminal intent."

This quotation was used and applied in the case of *State v. Surry* (Wash.), 63 Pac. 557, 560, which was an assault case.

The law with reference to assault and battery in what may be called the "automobile cases" is summarized by the court in its syllabi in the case of *Tift v. State*, 17 Ga. App. 663, 88 S. E. 41, as follows:

"1. Assault and battery may be committed by striking another with an automobile intentionally, or by driving the machine so recklessly as to justify a jury in finding that there was a reckless disregard of human life and safety. *Dennard v. State*, 14 Ga. App. 485, 81 S. E. 378. The same is true where, under like circumstances, the automobile is driven against another vehicle in which persons are riding, whereby the collision occasions bruises, blows, and similar physical injuries to persons in the vehicle so struck. *State v. Lewis*, 4 Pennewill (Del.) 332, 55 Atl. 3.

"2. Where the state's testimony tended to show a case of assault and battery through the reckless driving of an automobile, it was not error to charge the jury that 'a crime or misdemeanor shall consist in the violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence.'

"3. Nor in such a case was it error for the court to charge the jury as follows: 'Every person is presumed to intend the natural and necessary consequence of his acts.'

"4. Nor was it error in such a case for the court to charge the jury as follows: 'Persons traveling in automobiles or buggies have the lawful right to use a public highway, but in so doing they should not, without lawful justification or excuse, intentionally, wantonly, or recklessly drive their vehicle against that of another person, to the injury of such other person.'

"5. Nor in such a case was it error to charge the jury that, 'If the defendant did not intentionally cause said ma-

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chine to run against said buggy, but at the time of such collision said Tift was intentionally handling said machine in such a wanton or reckless manner, or intentionally driving said machine at a rate of speed so high and reckless, as to render said machine obviously dangerous to other travelers upon such highway, and, as a result, the said machine ran against said buggy, thereby inflicting such personal injuries, the defendant would be guilty of assault and battery,' especially where the court also, in the same context, charged the jury that, 'if the defendant did not intentionally run said machine against said buggy, and at the time the collision occurred defendant was not intentionally driving said car in such a wanton or reckless manner, or at so high rate of speed, as to render said machine obviously dangerous to others traveling said highway, whereby the collision occurred, and such collision was not caused by any evil design, intention, or culpable neglect on the part of said Tift, then such collision would be attributable to misfortune or accident, and said Tift would not be guilty of any offense.' "

The sixth paragraph of the syllabus in *Tift v. State, supra,* is too lengthy to justify repeating, but is in accord with the following from the opinion in the case of *Luther v. State,* 177 Ind. 619, 98 N. E. 640, also an automobile and assault and battery case:

"In these cases of personal injury there is a constructive intention as to the consequences, which entering into the wilful, intentional act, the law imputes to the offender, and in this way, a charge which otherwise would be mere negligence, becomes, by reason of a reckless disregard of probable consequences, a wilful wrong. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person, is recognized as an elementary principle in criminal law."

In *Commonwealth v. Bergdoll,* 55 Pa. Super. Ct. 186, it was held that a verdict of guilty of assault in operating an automobile will be sustained where the evidence shows that

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the machine was run with reckless speed on the wrong side of the highway, and in such a manner that it zigzagged from side to side. In *Fishwick v. State,* 33 Cir. Ct. Rep. (Ohio) a conviction for assault and battery was sustained where there was no intent to injure and where the automobile was driven at a high rate of speed.

See also section 916 Berry on Automobiles (2nd ed.); *Schneider v. State,* 181 Ind. 218, 104 N. E. 69; *State v. Schutte,* 87 N. J. L. 15, 93 Atl. 112; Id. 88 N. J. L. 396, 96 Atl. 659.

The mere fact, however, that the defendant was driving at a speed whereby he violated the speed ordinance would not make him guilty of assault in this case. *Commonwealth v. Adams,* 114 Mass. 323, 19 Am. Rep. 362. But " the fact that the act was done in violation of a city ordinance was proper evidence for the consideration of the jury on the question of negligence." *Commonwealth v. Hawkins, supra.*

The attorney-general in his brief assumes that the charge of assault with intent to commit upon the person of another a bodily injury, as the offense is described in section 1658 R. S. 1908 and as charged in the informtion, includes a charge of assault and battery. It is to be noted, however, that the information does not charge a battery. It goes no further than to charge an assault of an aggravated nature. It includes all the elements of a simple assault, and therefore includes a charge of simple assault, but it does not include the elements necessary to constitute a battery, and therefore there could not be a conviction of battery under the information in this case. The rule applicable here is concisely stated in 22 Cyc. 473 as follows:

"An indictment for assault with intent to do bodily harm or great bodily harm includes a simple assault. So an indictment for an assault with intent to do bodily harm includes an assault and battery, if a battery is averred, but not if the battery is not charged."

In 5 C. J. 765 it is said:

"A defendant cannot be convicted of a battery under an indictment which does not charge a battery."

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See also *People v. Johnson*, 147 Ill. App. 86; *Moore v. People*, 26 Ill. App. 137; *Bryant v. State*, 41 Ark. 359; *Turner v. Circuit Judge*, 88 Mich. 359, 50 N. W. 310; *Jones v. State*, 100 Ark. 195, 139 S. W. 1126; *Alyea v. State*, 62 Nebr. 143, 86 N. W. 1066; 1 Wharton's Crim. Law (10th ed.), section 640; 1 Bishop's New Crim. Law, section 803.

The evidence in this case was conflicting, and we express no opinion as to what the verdict of the jury ought to have been upon the issue they should have been required to consider. The conclusions we reach are as follows:

1. That there was no evidence of a specific intent on the part of the defendant to commit a bodily injury either upon the party injured or any other person, and the defendant could not be convicted of an assault with intent to commit a bodily injury as charged in the information.

2. That since no battery was averred in the information the defendant could not be convicted of assault and battery.

3. That there was some evidence of such negligence as would make the defendant guilty of simple assault.

4. That the trial court ought to have submitted to the jury the question of defendant's guilt of simple assault.

5. That the trial court erred in directing the jury to render a general verdict of not guilty.

Judgment reversed.

Mr. Chief Justice White and Mr. Justice Bailey concur.

No. 8941.

MANZOLI v. THE PEOPLE.

Decided December 3, 1917.

Plaintiff in error was convicted of violating the prohibition act of 1915.

Affirmed.

1. APPEAL AND ERROR—*Instructions.* Where the court's attention was not called to any imperfection or oversight in an instruction and no objection was made or exception saved to the giving

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of it, error based thereon will not be considered in the appellate court.

2. TRIAL—*Remarks of District Attorney.* The district attorney in the course of his argument to the jury said, "In my opinion, gentlemen, this is the strongest case of those tried." Upon objection, the court stated to the prosecutor, "Every case must stand upon its own bottom." *Held*, that while the remark was improper, under the circumstances, it did not constitute reversible error.

Error to the District Court of Las Animas County, Hon. Granby Hillyer, Judge.

Mr. B. MALCOLM ERICKSON, Mr. RALPH L. CARR, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General, Hon. FRED FARRAR, Attorney General, Mr. CHARLES ROACH, Assistant, Mr. CLEMENT F. CROWLEY, Assistant, for the People.

En banc.

MR. JUSTICE GARRIGUES delivered the opinion of the court.

January 10, 1916, an information was filed in the district court of Las Animas county charging that Frank Manzoli on January 4, 1916, did unlawfully sell and keep for sale intoxicating liquors and did unlawfully offer intoxicating liquors for sale, barter and trade contrary to section 1, page 275, laws of 1915.

January 18, 1916, Earl Cooley, Esq., entered his appearance as attorney for defendant, who was arraigned, pleaded not guilty and the case was set for trial on February 15, 1916. When the case was called in the morning for trial on the opening of court that day, the court permitted Mr. Cooley at his request, to withdraw his appearance. Defendant stated in open court that he wanted to go on with the trial, but could not afford to pay an attorney; that if the court wanted him to have an attorney it could appoint one for him. The court replied that if he was not able to employ counsel it would appoint one for him, but if he was able to do so, he would have to go to trial, and continued the case until the afternoon session. When the case was

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reached in the afternoon, the court inquired of defendant if he had employed counsel, to which he replied that he had not. The court then said that it had investigated defendant's financial standing and found that he was able to employ an attorney; but that he might try his own case if he wanted to. Defendant then said if the case was continued over the term, he probably would be able to employ counsel, to which continuation the district attorney objected. The court then stated again that it found defendant was able to employ counsel, that he could not get a continuance that way, and ordered the case to proceed. Whereupon eight jurors were called into the jury box which exhausted the panel and the court issued a special venire for ten more jurors and ordered the eight in the box examined. Thereupon these eight jurors were examined by the district attorney, by the defendant without the aid of counsel, and by the court and passed for cause and the court took a recess to await the sheriff's return on the open venire. Later, when court again convened, Mr. Carr asked to have the names of himself and Mr. Erickson entered as counsel for defendant, which was done, and they then announced that they were ready to proceed with the trial. Thereupon the jury of twelve was completed and counsel were permitted to examine all the jurymen in the box and twelve jurymen, accepted by both sides, were sworn to try the case.

The evidence showed that defendant was running a grocery store; that he lived in the rear end of the store with a partition between the store and his living room and there was a short hallway between the store room and the kitchen. January 4, 1916, officers searched the premises to see if any intoxicating liquors were kept in defendant's possession contrary to law, and found on ice in the ice chest in the hallway between the store and the kitchen, 60 bottles of beer, and setting beside the ice chest an unopened barrel of bottle beer. In the cellar under the grocery store, they found six kegs of whiskey, part of a barrel of bottle beer, a keg of beer, six quarts of red top rye, two quarts of rock and rye, one keg of wine and whiskey mixed, one barrel of

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wine and five quarts of wine. When the officers went to make the search, defendant told them it was vinegar he had in the cellar, which the jury must have found untrue. The barrels and kegs containing liquors were arranged in regular order on benches or platforms around the cellar, lying flat down with the spigots outward. The spigots were not stuck, but opened easily and had the appearance of being recently used. Two whiskey glasses, one containing a small portion of whiskey and the other some wine, were standing on the head of an empty keg.

Section 21 of the act under consideration makes the finding of an unusual amount of intoxicating liquor in one's possession, prima facie evidence in certain cases, of a violation of the act. The principal error assigned relates to an instruction given relative to the burden of proof in cases where the statute provides that certain acts shall be prima facie evidence of its violation. The court's attention was not called to any imperfection or oversight in the instruction. No objection of any kind was made thereto and no exception was taken or saved to the giving of the instruction complained of and no instruction covering this subject was tendered to the court. Under such circumstances, counsel cannot urge the giving of a faulty instruction as ground for reversal.

The district attorney, Mr. Hendrick, in the course of his remarks to the jury, said: "In my opinion, gentlemen, this is the strongest case of those tried." To which remark objection was made, and the court said: "Mr. Hendrick, every case must stand upon its own bottom." Complaint is made that this was an expression of the district attorney's opinion, that the accused was guilty, and constituted sufficient prejudicial error to reverse the case. We think the rebuke of the court was, under the circumstances, sufficient. While the remark was improper and the public prosecutor should not have made it, we do not think it sufficient to reverse the case. In *Jordan v. People*, 19 Colo. 417, 422, 36 Pac. 218, 220, this court said:

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"The nature and scope of argument that will be permitted in a cause is largely within the discretion of the presiding judge. It is the duty of the court to see that the bounds of propriety are not transgressed, but an appellate court will only interfere when a gross abuse of discretion is made to appear."

In this case we are constrained to adopt the words of the supreme court of Indiana where it is said:

"If, for every transgression of the prosecuting attorney beyond the bounds of logical or strictly legal argument, the defendant could claim a new trial, few verdicts could stand, and the administration of criminal justice would become impracticable." *Morrison v. State,* 76 Ind. 335-343.

Judgment affirmed.

No. 9013.

HAGGIN, ET AL., *v.* THE INTERNATIONAL TRUST CO., ET AL.

Decided December 3, 1917.

Action involving objections and protest to the admission of a will to probate, as to a bequest to the city of Denver. Objections and protest overruled.

Affirmed.

1. WILLS—*Construction.* The rule paramount in the construction of wills is to have due regard to the directions of the will, and the true intent of the testator derived primarily from the language of the will itself, and if this is not contrary to positive rule of law, or is not opposed to sound public policy, then the will must be given the effect its language imposes.

2. *Charitable bequest.* A will provided that proceeds of certain property should be devoted to the construction of an ornamental gate or arch in the civic center of the city of Denver, with a simple inscription thereon, as a memorial to the testator and his wife. *Held,* that the bequest was for a charitable purpose within the meaning of the law.

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3. *Validity of Bequest.* A charitable bequest is not rendered invalid because trustees are not named, nor because a trustee incapable of taking it, is named.

4. PERPETUITIES—*Charitable Bequest.* The law against perpetuities has no application to public charitable gifts.

5. TRUSTS—*Municipal Corporations—Powers.* The City and County of Denver is by express provision of the constitution authorized to accept gifts of the character under consideration, and is capable of taking the property and executing the trust in accordance with the provisions of the will.

6. COURTS—*Jurisdiction.* Courts have original inherent jurisdiction over charitable gifts and trusts.

Error to the County Court of the City and County of Denver, Hon. Ira C. Rothgerber, Judge.

Mr. WILLIAM V. HODGES, Mr. D. EDGAR WILSON, Mr. RICHARD B. SCANDRETT, JR., Messrs. LEWIS & GRANT, for plaintiffs in error.

Messrs. HUGHES & DORSEY, Mr. E. I. THAYER, Mr. JAMES A. MARSH, Mr. THOMAS H. GIBSON, for defendants in error.

En banc.

MR. JUSTICE SCOTT delivered the opinion of the court.

THIS action is to review the judgment of the County Court of the City and County of Denver, admitting to probate the last will and testament of J. H. P. Voorhies, over the objections and protests of plaintiffs in error, as to one specific bequest. The protest goes to provisions of the will, with supplemental codicils as follows:

"Eleventh. All the rest and residue of my estate, real, personal and mixed, when sold and converted into cash by my executor, shall be devoted and applied to the construction of an ornamental gate or arch of stone at some entrance to or at some suitable part of the Civic Center in the City and County of Denver, to be built in the City

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and County of Denver, State of Colorado, with some suitable and simple inscription thereon, as a memorial to my beloved wife and myself: Provided, however, that my executor shall select some suitable persons among my surviving friends to act in conjunction with the officials of the City and County of Denver, in the selection of the design for said gate or arch, the material to be employed therein and the construction thereof, to the end that the real intent and purpose of this particular direction in my will shall be carried out in good faith, according to its true intent and purpose, and that said persons shall, in all respects, possess equal power and authority in the premises with the officials of said City and County of Denver, and all moneys covered by this particular bequest shall be paid out by my executor, subject to the approval of the said persons so selected.

Twelfth. * * * And I do hereby devise and bequeath to my said executor, for the purposes aforesaid, the title to all of my property of which I may die seized, or be in any manner entitled to at the time of my death, save and except said specific bequests contained in said paragraphs numbered 'Second,' 'Third,' 'Fourth,' and 'Fifth.'

I do further will and direct that my said executor shall, with all reasonable dispatch, sell and convert into cash, all of the property hereinbefore devised and bequeathed to it, directing and declaring that none of such property shall be sold at a sacrifice."

The contentions of plaintiffs in error are: (a) that the trust thus created is not a charitable trust, (b) that it violates the rule against perpetuities and (c) that there is no beneficiary with power to enforce the trust.

In the very elaborate opinion of Mr. Justice Steele, in the case of *Clayton v. Hallett,* 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117, it was said that "The decisions in the United States concerning charitable trusts cannot be reconciled." A study of the voluminous briefs in this case lends strength to that conclusion. In that case

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there was announced certain conclusions of law applicable and controlling in this action. Among these are to be noted:

The principles of the common law as it existed prior to the fourth year of James I., so far as applicable are in force in Colorado and charitable uses are to be enforced in accordance with the principles of the common law.

The statute of 43 Elizabeth, chapter 4, so far as it recognizes or indicates what are charitable uses and gives validity to gifts for such uses is in force as a part of the common law, but the details of the statute and remedies therein provided, are inapplicable and are not in force. But independently of that statute the courts have original, inherent jurisdiction over charitable gifts and trusts.

A bequest or devise to charity is not affected by the law applicable to perpetuities, or the accumulation of income, but is to be given the most liberal construction to the end that the wishes of the donor may be enforced.

A devise to charity is not rendered invalid because trustees are not named, nor because a trustee is incapable of taking it, is named.

Municipal corporations may take and hold property in trust for charitable uses within the scope of their powers or duties, and if such trust is repugnant to or inconsistent with the proper purposes for which the corporation was created, the corporation may not be compelled to execute it, but it will furnish no ground to declare the trust itself void.

The rule paramount in the construction of wills as settled in this jurisdiction, is to have due regard to the directions of the will, and the true intent and meaning of the testator, derived primarily from the language of the will itself, and if this is not contrary to positive rule of law, or is not opposed to sound public policy, then the will must be given the effect its language imposes. *Tuckerman v. Currier,* 54 Colo. 25, 129 Pac. 210, Ann. Cas. 1914C, 599.

Excepting only certain specific bequests named in preceding paragraphs of the will, the language of the bequest is:

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"I do hereby devise and bequeath to my said executor for the purposes aforesaid the title to all my property of which I may die seized, or be in any manner entitled at the time of my death." With specific direction, "That my said executor shall with all reasonable dispatch sell and convert into cash all of the property hereinbefore devised and bequeathed to it."

The purpose and use of the property, when so converted, was declared in unmistakable language to be:

"Shall be devoted and applied to the construction of an ornamental gate or arch of stone at some entrance to or at some suitable part of the Civic Center in the City and County of Denver, to be built in the City and County of Denver, State of Colorado, with some suitable and simple inscription thereon, as a memorial to my beloved wife and myself."

The Civic Center is the common and official designation of a portion of the city's public grounds, partaking of the nature and character of a public park, designed for public comfort and convenience, and among other things to promote civic beauty and civic pride, with present and proposed ornamentation by means of monuments, fountains and otherwise. It is held and controlled by the city as are other public improvements.

Is then the trust declared by the will, a charitable or a private trust.

It was for "the construction of an ornamental gate, or arch of stone at some entrance to or at some suitable part of the civic center. With some suitable and simple inscription thereon, as a memorial to my beloved wife and myself."

It is contended by counsel that the prime purpose of the testator was to construct a monument to himself, and that a trust with a direction to erect a memorial to a private individual is not charitable. In the abstract sense, if this be a true premise, the legal conclusion is sustained by respectable authority. But the language used does not

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justify the assumed premise. It is true that it is provided that the gate or arch shall bear "some suitable and simple inscription thereon as a memorial to my beloved wife and myself." A suitable and simple inscription is the expression of a desire too modest in itself to include any thought of an exploitation of the acts or deeds of the testator. It cannot be construed to mean more than a suitable statement calling to mind in a simple way the name of the donor of the ornament. It was to be an "ornament," permanent in character, of stone, in the form of a gate or arch, preferably to mark an entrance to the grounds of a city's beauty and comfort spot. It was therefore to be a suitable and appropriate ornamental part of the Civic Center itself. Indeed, it would be an ungracious act upon the part of the city, if it did not place a suitable and simple inscription upon such an ornament in memory of the donor, whether suggested in the will or not.

Counsel for plaintiffs in error strongly rely on *Morristown Trust Co. v. Morristown*, 82 N. J. Eq. 521, 91 Atl. 736. In that case the legacy appropriated $5,000 for the erection of a bronze and granite base for the flag staff in the Morristown park, when the consent shall be obtained from the trustees of the park, and the municipal authorities of the city, the base to bear an inscription that it was erected in memory of testator's father. In that case the trustees of the city refused the consent of the city, and this action was held to operate as a rejection of the legacy. But the language of the decision as relates to the question of whether it was a charitable trust, sustains the contention of plaintiffs in error. This contention is narrow, and as we view it, not in harmony with the liberal view adopted by this court in *Clayton v. Hallett, supra,* and seemingly by the weight of authority.

Mr. Perry in his work defines charitable trusts as follows:

"Trusts for charitable uses form a large and important class of trusts. The questions that arise under this head are numerous, and often complicated and difficult of solu-

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tion. Charitable trusts include all gifts in trusts for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick, and afflicted; and all the gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire to have them applied." Perry on Trusts, § 687.

This definition seems to be well sustained by authority.

In the matter of the establishment of a charity as a memorial the rule is said to be:

"As heretofore stated, in determining whether a gift is a charitable one, the courts will look to the nature and object of the gift rather than the motive of the donor making it. Therefore the mere fact that a charity is also intended as a private memorial does not affect its public character or its validity. If an act, to be a charity, must indeed be free from any taint of selfishness, very much that passes under the name is spurious. But though the founding of a public charity to perpetuate one's name may not come up to the abstract idea of a Christian charity, it is uniformly treated as a charity by courts of justice." 5 Ruling Case Law, p. 325.

In *Estate of Smith,* 191 Pa. St., 109, 37 Atl. 114, the testator bequeathed the sum of $500,000 for the construction of a memorial monument in a city park. This was held to be a charitable trust and that it did not violate the law against perpetuities, notwithstanding the testator had directed that a bronze statue of himself, with his name underneath, in large letters, shall be placed on the memorial. The court said, "The whole current of authorities, remote as well as recent, approve and sustain such disposition of his estate as is directed by Mr. Smith, and settles the same beyond all dispute, a charitable trust.

In re Estate of Graves, 242 Ill. 23, 89 N. E. 672, 24 L. R. A. (N. S.) 283, 134 Am. St. Rep. 302, 17 Ann. Cas. 137, involved a bequest for the erection of a drinking fountain for horses in connection with and in addition to a monu-

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ment, "which shall consist of a life size bronze statue of a horse, named 'Ike Cook,' the first horse to trot a mile in 2:30, over a mile track in the state of Illinois, etc.," with direction "to carve on said monument and fountain, in a conspicuous place, my name as the person erecting said monument and fountain, the name of the horse, his record, etc." This gift was sustained as a charitable trust, and it was said by the court:

"It has always been the policy of the law to uphold charitable bequests and give effect to them whenever possible, and because our statute now exempts these bequests from the payment of the inheritance tax is no reason for departing from or modifying this ancient rule of construction favoring these charitable gifts. It will be seen from the definition above quoted that the meaning applied to the word 'charity' is comprehensive and not restricted, and includes the erecting and maintaining of public buildings or works or otherwise lessening the burdens of government. This bequest could be upheld for these reasons alone."

In *Bartlett Petitioner*, 163 Mass. 509, 40 N. E. 899, one of the bequests was the income from the sum of sixty thousand dollars in trust to be used in developing and beautifying the present Ravenswood Park grounds by clearing away the deadwood and other incumbrances, and for the purchase of other contiguous woodlands, that may be essential in perfecting its present form and completion. This was held to be a good public charitable gift.

These authorities with many others cited, and of like import, make it clear that the bequest in this case was for a charitable purpose within the meaning of the law.

Having determined that the bequest was a charitable one, it can serve no useful purpose to discuss the question argued that the bequest is in violation of the law against perpetuities, in view of the careful consideration and determination of that question in *Clayton v. Hallett, supra*, contrary to the contention of plaintiffs in error, and it

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must be regarded as the settled law in this jurisdiction that this rule is not applicable to public charitable gifts.

In answer to the contention of plaintiffs in error, that there is no beneficiary under the will with power to enforce the trust, it may be said that Sec. 1, Art. 20, of the constitution of the state provides that the municipal corporation of the City and County of Denver:

"May receive bequests, gifts and donations of all kinds of property in fee simple or in trust for public, charitable or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests and donations, with power to manage, sell, lease or otherwise dispose of the same in accordance with the terms of the gift, bequest or trusts."

Further, it is provided by Sec. 102 of the Charter of the City and County of Denver:

"Real or personal property may be granted, bequeathed, devised or conveyed to the City and County for the purpose of improvement and ornamentation of any park, boulevard, pleasure-way or parkway, or for the establishment or maintenance therein of museums, zoological or other gardens, collections of natural history, observatories, libraries, monuments or works of art, upon such trusts or conditions as may be approved by the Commission (park) and Council; and all such property, or the rents, issues and profits thereof shall be subject to the exclusive management and control of the Commission."

It appears as a fact that the City and County of Denver has duly accepted the trust in question. The City and County of Denver is by the express provision of the constitution authorized to accept gifts of the character under consideration, and therefore to accept the legal title thereto, and may take the equitable title as cestui que trust, and is such in this case, at least by necessary implication under the terms of the will. This principle was stated in *Clayton v. Hallett*, as follows:

"It may be stated as a general proposition of law that a corporation capable of holding real estate is capable also

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of executing a charitable trust, unless the statute or the articles of incorporation prohibit it. And unless specially restrained, municipal corporations may take and hold property in their own right by direct gift, conveyance or devise, in trust, for purposes germane to the objects of the corporation, or which will promote, aid, or assist in carrying out or perfecting those objects. So, in this case, unless the objects of the incorporation of the city of Denver are foreign to the purpose expressed in this trust, the city of Denver is capable of taking the property and executing the trust in accordance with the provisions of the will."

Counsel complain of the proviso, in the 11th paragraph of the will directing the selection of some suitable surviving friends, to act with the city officials in the selection of the design for the gate or arch, the material to be employed and the construction, and which also provides that all moneys covered by the particular bequest shall be paid out by the executor, subject to the approval of such committee of friends. It is urged that the trust is thus invalidated, because it is so far dependent upon the discretionary acts of persons named or unnamed that the court cannot itself take the place of the committee of friends, in this respect and compel the city to consent to the construction upon the Civic Center of the design so selected. These selected friends act jointly with the city in the selection of the design and material to be used in the construction. They must approve the payment of moneys therefor. The purpose of this was declared to be, "to the end that the real intent and purpose of this particular direction in my will shall be carried out in good faith according to its true intent and purpose." These friends were to take nothing under the will. The provision relates in no way to the vesting or substance of the bequest. They were to be selected presumably to exercise that friendly interest in the testator and his desire in the premises, as might reasonably be expected to aid in carrying out his desire in its good faith, intent and purpose. The provision clearly relates to matters of detail in the administration of the trust, and

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can have nothing to do with the substance or the manner of vesting the bequest. These friends are under this provision, merely trustees with powers limited to the definitely prescribed duties in the matter of administration; to approve the design, material to be used, manner of construction, and the proper expenditure of the funds to be used therefor. There is here no power given to change or alter the purpose, nor to limit the amount so to be expended.

In *Craig Administrator v. Sechrist*, 54 Ind. 419, the will provided: "It is my will that the said school fund be placed in the hands of two judicious colored persons of Owen County, to have control and to manage the same for the benefit of the colored children of Owen County." This was sustained as against the objection of uncertainty.

In the well considered case of *John v. Smith*, 102 Fed. 218, 42 C. C. A. 275, substantially the same objection was made as here. The testator bequeathed his estate for the purpose of establishing and maintaining free public schools in a particular town, and provided that after fifteen years, the trust should be managed by three trustees, one to be selected by the judge of the state Circuit Court; one by the judge of the United States District Court; and the third to be selected by these two judges jointly. The will was sustained. It was said:

"But if, indeed, they should decline to accept the trust, and refuse to appoint the trustees, the purpose of the testator in making the charitable disposition of his property would not be thereby frustrated. There can be no doubt that in such an event a court of equity would raise up a trustee or trustees to effectuate the intention of the testator by exercising its ordinary jurisdiction to see that the trust should not fail for want of a trustee. Pom. Eq. Jur., § 1026."

It is common in cases of charitable bequests for the testator to provide that the trustees named are to select their successors; and also to direct that a corporation shall be organized for the purpose of administering the trust.

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It is generally held that courts look upon charitable bequests with great favor and will not speculate as to possible happenings, in order to defeat them.

The judgment is affirmed.

NOS. 9213 AND 9214.

BOWMAN v. THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.

Decided November 5, 1917.

Actions on contract. Judgments for plaintiff.

Affirmed.
On Application for Supersedeas.

1. ADJUDICATED CASES. Judgments affirmed on authority of *Bowman v. Atchison, Topeka & Santa Fe Railway Co.*, 61 Colo. 477.

Error to the District Court of the City and County of Denver, Hon. Charles Cavender, Judge.

Mr. OTTO BOCK, Mr. W. L. BOATWRIGHT, for plaintiff in error.

Messrs. ROGERS, ELLIS & JOHNSON, Mr. GARDINER LATHROP, Mr. ROBERT DUNLAP, Mr. PERCY ROBINSON, for defendant in error.

En banc.

PER CURIAM.

THE Atchison, Topeka & Santa Fe Railway Company, a corporation, sued Bowman and judgment was rendered against it in each case. Thereupon it brought the cases to this court and the judgments were reversed. Upon retrial, the cases were consolidated, and determined upon the evidence in the prior trial as embodied and contained in

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the bills of exceptions therein, resulting in a judgment in each case in favor of the plaintiff, and the defendant brings the cases here for review. The facts are sufficiently set forth in the opinion in *Atchison, Topeka & Santa Fe Railway Company v. Bowman*, 61 Colo. 477, 158 Pac. 814, and we shall not burden the record with a re-statement thereof.

Plaintiff in error contends that the contract forming the basis of the suits can not be enforced because it is in violation of "An Act to Regulate Commerce," approved February 4, 1887, and acts amendatory thereof, and especially Section 6 as amended by the Act of June 29, 1906, 34 Stat. pp. 586-589 (U. S. Comp. Stats. 1913, Sec. 8569).

These questions are fully discussed in the former review of the cases, and the objections held untenable. The application for supersedeas is, therefore, denied, and the judgments affirmed.

No. 9251.

THE INDUSTRIAL COMMISSION OF COLORADO, ET AL., *v.* ANDERSON.

Decided December 3, 1917.

Action by employe to recover under the workmen's compensation act, for injuries sustained while on his way to work. Judgment for claimant.

Reversed.

1. WORKMEN'S COMPENSATION—*Statutory Construction.* Under sec. 8, chap. 179, S. L. 1915, p. 522, providing when the right to compensation shall obtain, it is necessary that both the service being performed and the injury sustained shall arise out of and in the course of employment.

2. *Act Construed.* The intent is to make the industry responsible for industrial accidents only, and not those resulting from hazards common to all.

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3. *Accident Occurring While on the Way to or from Work.* In the absence of special circumstances bringing the accident within the scope of the employment, no compensation is recoverable by a workman who is injured while on his way to or from work.

Error to the District Court of the City and County of Denver, Hon. John H. Denison, Judge.

Mr. WILLIAM R. EATON, Mr. LESLIE E. HUBBARD, Attorney General, Mr. WALTER E. SCHWED, for plaintiffs in error.

Mr. LEROY MCWHINNEY, for defendant in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

PLAINTIFFS in error bring here for review a judgment of the district court reversing the conclusions of the Industrial Commission of the State of Colorado, wherein defendant in error was found not entitled to compensation under the Workmen's Compensation Act. In this opinion the parties will be designated as in the court below.

The facts as disclosed by the findings of the Commission are that the plaintiff, a man of about seventy-eight years of age, was employed by The Robert D. Sharp Music Company as a repairer of musical instruments. He worked in Denver at the shop in the store of his employer, down town, and also had a work room at his home, where he occasionally took instruments to repair. On the morning he was hurt he had worked at his home before breakfast, after which he went out upon the street to take the car for his employer's store. While attempting to board a street car, a passing automobile caused him to step back quickly toward the sidewalk, and in so doing he slipped on the ice and fell, resulting in the injury for which compensation is sought.

It appears that plaintiff had the privilege of taking work home with him from the store, but that this was not required of him, and was in no sense one of the conditions of his employment, and that his prescribed working hours

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were from eight o'clock in the morning until six in the evening, and that the accident occurred between these hours. The claim was given three hearings before the Commission, but the adverse conclusion first reached was not modified by subsequent hearings. Plaintiff was dissatisfied with the findings, and instituted action in the district court under section 78 of the Act. The district court reversed the conclusions of the Commission, and held, upon the facts, that the plaintiff was entitled to compensation. It is this alleged improper application of the law to the facts that we are called upon to review.

Plaintiff's right to recover depends upon certain conditions, enumerated in Section 8, Chapter 179, Session Laws, 1915, at page 522:

"Sec. 8. The right to the compensation provided for in this act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury or death accidentally sustained on and after August 1, 1915, shall obtain in all cases where the following conditions concur: I. Where, at the time of the accident, both employer and employe are subject to the provisions of this act. II. Where, at the time of the accident, the employe is performing service arising out of and in the course of his employment. III. Where the injury is proximately caused by accident arising out of and in the course of his employment, and is not intentionally self-inflicted or intentionally inflicted by another."

Under this section it is necessary that both the service being performed and the injury sustained shall arise out of and in the course of the employment. The intent is to make the industry responsible for industrial accidents only, and not those resulting from hazards common to all. *In re McCarthy* (Ohio), 7 N. C. C. A. 417, Ohio Ind. Com. No. 59526; *Worden v. Commonwealth Power Company* (Mich.), 4 N. C. C. A. 853; *Hopkins v. Mich. Sugar Company*, 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310; *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 414.

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In discussing the nature of the relief granted by workmen's compensation acts, the Massachusetts court in *In re Madden*, 222 Mass. at page 494, 111 N. E. at page 382, L. R. A. 1916D, at page 1004, said:

"The act is not a substitute for disability or old age pensions. It cannot be strained to include that kind of relief. Its ultimate purpose simply is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business. It does not afford compensation for injuries or misfortunes, which merely are contemporaneous or coincident with the employment, or collateral to it. * * * The relief is so new that the tendency may be to inquire only as to the employment and the injury and to assume that these two factors constitute ground for compensation. But the essential connecting link of direct causal connection between the personal injury and the employment must be established before the act becomes operative. The personal injury must be the result of the employment, and flow from it as the inducing proximate cause. The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment, and not by some other agency, or there can be no recovery. In passing upon this question, an humanitarian emotion ought not to take the place of sound judgment in the weighing of evidence. The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being."

The same court construes the terms "arising out of" and "in the course of" the employment, in *Re McNicol et al.*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, in the following language:

"* * * In order that compensation may be due, the injury must both arise out of and also be received in the course of the employment. Neither alone is enough. It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words which shall accurately include all cases embraced within

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the act, and with precision exclude those outside its terms. It is sufficient to say that an injury is received 'in the course of' the employment, when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In this case the injury was received while the employe was on his way from his home to his regular place of employment. It is true he was permitted to do some work at home, both in and out of working hours, and that on the morning he was injured he had been employed in his own shop on work he had taken home on the previous evening. It is shown, however, that he was not obliged to do any work at home. He says he did as he pleased about that; a work room was provided at the store and when he worked at home it was of his "own free will and accord." Clearly, then, the trip from his home workshop to the one at the store was neither incident to, or a hazard of, his employment.

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The rule that compensation must be denied when the injury occurs away from the employer's premises from causes which are common hazards, and the employe is not hired to work continually upon the streets as part of the contract of his employment, is stated in L. R. A. 1916A, in an annotation at page 314:

"It is a general rule laid down by the great majority of the cases that an injury cannot be said to arise out of the employment of the injured workman where it occurs upon a street, from causes to which all other persons upon the street are likewise exposed. Thus, compensation has been denied in the following cases, where the injury occurred in the manner indicated: *Rodger v. Paisley School Bd.* (1912) S. C. 584, (1912) W. C. Rep. 157, 49 Scot. L. R. 413, 5 B. W. C. C. 547 (school janitor taking message from one head master to another, overcome by heat while on the street); *Symonds v. King* (1915), 8 B. W. C. C. (Eng.) 189 (painter's laborer obliged to cross street to obtain some paint, knocked down by a tram car); *Sheldon v. Needham* (1914) 30 Times L. R. (Eng.) 590, 50 Sol. Jo. 652, 137 L. T. Jo. 212 (1914) W. C. & Ins. Rep. 274, 111 L. T. N. S. 729, 7 B. W. C. C. 471 (charwoman sent to post a letter fell and broke her leg on the street); *Green v. Shaw* (1912), 2 I. R. 430, (1912) W. C. Rep. 25, 46 Ir. Law Times, 18, 5 B. W. C. C. 573 (workman obliged to go but once or twice a day over a quiet country road, injured while riding his bicycle); *Slade v. Taylor* (1915) W. C. & Ins. Rep. (Eng.) 53, 8 B. W. C. C. 65 (manager of branch store, who was compelled to go to another branch store once a week, slipped off his bicycle and injured himself); *Hopkins v. Michigan Sugar Co.* (employe of sugar company employed to inspect plants in different places, who, after returning to his own city slipped while running to get a street car to return to his home); (*Hopkins v. Michigan Sugar Co.*, 184 Mich. 87), 150 N. W. 325 (L. R. A. 1916A, 310); *Newman v. Newman* (1915), 169 App. Div. 745, 155 N. Y. Supp. 665 (employe in meat market, injured while on street, delivering meat on foot); *De Voe v. New York State Ry. Co.* (1915), 169 App.

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Div. 472, 155 N. Y. Supp. 12 (motorman, having closed his day's work, slipped on the street while going to have his watch tested.)"

In *Hopkins v. Michigan Sugar Co., supra,* the claimant was a general engineer employed to inspect sugar factories in different cities. He slipped on the ice and fell while attempting to catch a street car to return to his home, after finishing an inspection trip. In discussing whether the accident arose out of and in the course of his employment the court said:

"The question of whether deceased was in any sense within the ambit of his employment at the time and place of the accident is a serious one; but, conceding that the injury befell him in the course of his employment, can it be fairly traced to his employment as a contributing, proximate cause, or did it come from a hazard to which he, in common with others, would have been equally exposed apart from his employment? No direct causal relation is claimed in the particular that the nature of the business of manufacturing sugar in itself exposes its employees to unusual risks or danger of accidents of this nature."

After discussing the fact that deceased was protected under the act against the extra hazards to which he was exposed in travel under his contract of employment, the court continued:

"At the time of his accident he was passing on foot along a familiar highway, upon which was ice, and snow—a natural condition of that season of the year—involving an increased risk and added danger of falling, common to all, and known to all. * * * While it is indicated by the record that he desired to take a street car and was walking or running towards one for that purpose, to assert that he was injured in attempting to take or board a car would be a misleading overstatement. * * * The board found that 'he started from the sidewalk towards the car with the intention of boarding the same.' * * * Slipping upon snow-covered ice and falling while walking, or running is not even what is known as peculiarly a 'street

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risk'; neither is it a recognized extra hazard of travel or particularly incidental to the employment of those who are called upon to make journeys between towns on business missions. These distinctions are recognized and the rule correctly stated in an opinion of the Michigan Industrial Accident Board, filed in *Worden v. Commonwealth Power Co.*, 20 Det. Leg. News, No. 39 (December 27, 1913) as follows: 'It must also appear that the injury arose out of the employment and was a risk reasonably incident to such employment, as distinguished from risks to which the general public is exposed. To illustrate * * * it might be fairly said that one of the most common risks to which the general public is exposed is that of slipping and falling upon ice. This risk is encountered by people generally, irrespective of employment. * * * This unfortunate accident resulted from a risk common to all, and which arose from no special exposure to dangers of the road from travel and traffic upon it; it was not a hazard peculiarly incidental to or connected with deceased's employment, and therefore is not shown to have a causal connection with it, or to have arisen out of it."

By the great weight of authority it appears, in the absence of special circumstances bringing the accident within the scope of the employment, that no compensation is recoverable by a workman who is injured while on his way to or from his work. Note, L. R. A. 1916A, 331. In *De Constantin v. Public Service Commission*, 75 W. Va. 32, 83 S. E. 88, L. R. A. 1916A, 329, the rule is laid down as follows:

"If the place at which the injury occurred is brought within the contract of employment, by the requirement of its use by the employe, so that he has no discretion or choice as to his mode or manner of coming to work, such place and its use seem logically to become elements or factors in the employment, and the injury thus arises out of the employment and is incurred in the course thereof. But, on the contrary, if the employe, at the time of the injury, has gone beyond the premises of the employer, or

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has not reached them, and chosen his own place or mode of travel, the injury does not arise out of his employment, nor is it within the scope thereof."

From the undisputed facts in this case it is plain that claimant was not in any sense obliged to work at his home at any time, or at all. As matter of fact he was not working anywhere when the accident occurred, but was on his way to his employer's shop to begin work. Upon principle and authority it must be held that a repairer of musical instruments who slips on the ice and is injured while going to his work, cannot be held to be injured in the course of his employment, nor does the injury arise out of his contract of employment. Upon facts like these here disclosed or analogous to them, no case can be found where the Workmen's Compensation Act has been held to apply.

The judgment is therefore reversed, and the cause remanded with directions to affirm the conclusions and judgment of the Industrial Commission.

No. 8678.

RICHARDSON, ET AL., v. THE PEOPLE.

Decided January 7, 1918.

Defendants were convicted of voluntary manslaughter.

Reversed.

1. APPEAL AND ERROR—*Criminal Law—Confession of Error by Attorney General.* Where the prosecution, acting through the Attorney General, confesses error and asks for a reversal of the judgment, it is not incumbent upon the appellate court to investigate the record and determine the correctness of his conclusions.

Error to the District Court of Fremont County, Hon. Charles Cavender, Judge.

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Mr. HORACE N. HAWKINS, Mr. CHARLES D. BRADLEY, Mr. JOSEPH H. MAUPIN, Mr. LEE CHAMPION, Mr. B. F. REED, for plaintiffs in error.

Mr. LESLIE HUBBARD, Attorney General, for the People.

PER CURIAM.

PLAINTIFFS in error were convicted of voluntary manslaughter, and sentenced to serve terms in the penitentiary. They have assigned and argued numerous alleged errors occurring in the trial of the cause, which they claim entitle them to a reversal of the judgment. The prosecution, acting through the Attorney General, has filed a confession of error and asks for a reversal of the judgment. Under these circumstances, it is not incumbent upon us to investigate the record and determine as to the correctness of his conclusions. We therefore reverse the judgment and remand the cause.

No. 8624.

HAWKINS, ET AL., v. GRISHAM, AS SHERIFF, ET AL.

Decided January 7, 1918.

Action by claimants under a trustee's deed, to enjoin the execution of a sheriff's deed to the same property under a mechanic's lien decree. Judgment for defendants.

Reversed.

1. MECHANIC'S LIEN—*Action to foreclose—Parties.* Under sec. 4035 R. S. 1908, specifying who shall be made parties in an action to foreclose a mechanic's lien, all persons claiming of record any interest in the premises must be made parties, notwithstanding some of them may have acquired their interest subsequent to the time the lien attached.

Error to the District Court of Las Animas County, Hon. A. Watson McHendrie, Judge.

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Mr. BERNARD A. GOW, Mr. A. E. MCGLASHAN, for plaintiffs in error.

Mr. JESSE G. NORTHCUTT, Mr. E. B. UPTON, for defendants in error.

En banc.

MR. JUSTICE HILL delivered the opinion of the court.

ON September 1, 1908, Joseph Albo commenced the construction of a building on the lots in controversy then owned by A. & R. Lopresto. On April 19, 1909, there was executed by the Loprestos and recorded a deed of trust on the property to secure payment of their $5,500 note to A. I. Lindsey. On June 25, 1909, Albo filed for record his mechanic's lien statement. On September 28th, following, the Loprestos executed a second deed of trust on the property to secure the payment of their $800 note to Lindsey, recorded same date. On January 14, 1910, Albo filed his complaint in the district court to enforce his lien making the Loprestos only defendants. On February 3d, following Loprestos conveyed the property to Charles Lopresto, which deed was recorded February 5th. Summons was issued in the Albo suit February 9, 1910, and was personally served on the defendants February 17th following. On May 20, 1910, judgment was rendered in favor of Albo, decreeing a mechanic's lien and ordering sale. On December 8th following, a lien judgment was obtained in the same court by one Bonal as plaintiff against A. & R. Lopresto, A. I. Lindsey, and the public trustee of Las Animas County, as defendants. This lien was for materials furnished in the construction of this building. It was decreed to have priority over both deeds of trust, and sale under it was ordered. On February 20, 1911, the property was sold by the public trustee under the second deed of trust to McGlashan for $1,105. On December 7th following, a trustee's deed was executed on this sale, recorded December 8th, conveying the property to the plaintiffs in error, Hawkins and McGlashan, the latter having assigned

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to the former a half interest in the certificate. They thereafter bought the first deed of trust for the amount due, viz., $6,217.60, and had it released of record. They also paid the Bonal judgment in the sum of $570, and had it satisfied of record. On October 27, 1913, the defendant Grisham, as sheriff, sold the premises to the defendant Clerici under the Albo mechanic's lien decree for $1,033.12, and issued certificate of purchase therefor. Hawkins and McGlashan had no actual notice of the Albo lien, judgment, or sale when they purchased at the foreclosure sale or when the trustee's deed was issued to them. This suit was brought by them to enjoin the execution of the deed by the sheriff to Clerici. The court found that the building was completed about August 1, 1909, and less than six months prior to January 14, 1910, when Albo commenced his action; that the lien evidenced by his judgment and sale thereunder was prior in time and superior in law and equity to the deed of trust through which the plaintiffs claim; that the Albo judgment, etc., did not divest the plaintiff's title, but that to perfect it they must redeem from the Albo sale, also that they acquired no additional equities by having discharged of record the Bonal judgment or the first deed of trust.

Section 4034, Revised Statutes 1908, provides that:

"No lien claimed by virtue of this act shall hold the property longer than six months after the completion of the building."

Section 4035 provides that:

"The owner or owners of the property to which such lien shall have attached, and all other parties claiming of record any right, title, interest or equity therein, whose title or interests are to be charged with or affected by such lien, shall be made parties to the action."

The contention is that the trust deeds and the Bonal lien were of record when the suit was brought, and that the claimants thereunder should have been made parties defendants in the Albo suit; that as they were not, their interest in the property was not affected by it, and that

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as section 4035, *supra*, provides that no lien shall hold the property longer than six months after the completion of the building, that the lien cannot be recognized as valid against them in a suit brought along after the six-month period had expired; that in this respect, the statute making them necessary parties, they stand in the same position as the owner.

The defendants in error claim that subsequent or junior incumbrancers, although of record at the time the suit is brought to enforce the lien, are not indispensable or necessary parties in order to establish the validity of the lien against the property, or to thereafter have it recognized as valid against them in another action brought after the six-month period would have expired as against the owner had the former suit against them never been instituted. We cannot agree with this latter contention. The result would be to ignore the statute, which says that all such of record shall be made parties. In this respect, it differs from our former acts, the last of which provided that: "The owner of the property of which such lien shall have attached shall be made a party to the action."

The case of *San Juan Hardware Co. v. Carrothers*, 7 Colo. App. 413, 43 Pac. 1053, relied upon does not sustain the defendants in error's contention. In commenting upon the six-months' limitation clause then in force, the court (7 Colo. App. at page 418, 43 Pac. at page 1055) says:

"Taken by itself, this would seem to be a sweeping clause, which might possibly be held broad enough to necessitate the commencement of a suit against all persons to be affected by the foreclosure. The following section (2152) removes any question respecting it. It designates what persons shall be made parties. According to the latter section, all persons who have filed lien statements and who claim liens by virtue of the act are bound to be brought in. Under the very well established doctrine, '*Expressio unius est exclusio alterius*', the expression of the necessity to make lien claimants parties excludes any idea that the legislature intended by the preceding section to compel the claimant,

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in order to establish his rights, to bring a suit within the time limited against third persons who were interested in the property."

We agree with this conclusion, but instead of sustaining the defendants' contention it leads irresistibly to the contrary. Our present act provides that not only the owner, but other parties claiming of record any right, title, interest, or equity therein whose title or interest are to be charged with or affected by such lien, shall be made parties. By the reasoning in the opinion quoted from, it places other claimants of record in the same category as the owner, and other lien claimants were under the old statute concerning the six-month limitation.

The decree recognizes that the former judgment did not bind the interest of the plaintiffs in error, but holds that the lien itself was prior to their interest in point of time. In order to decide this question the court went into the facts upon which the lien judgment was based, and ascertained the date of the completion of the building, the date when the lien attached, the date of recording the deed of trust, etc.; for these purposes it ignored the lien judgment. It should likewise have been ignored in determining the six-month limitation period as between the parties to this action. This conclusion is supported by the following authorities: *Stoermer v. People's Savings Bank*, 152 Ind. 104, 52 N. E. 606; *Union National Savings & Loan Ass'n v. Helberg*, 152 Ind. 139, 51 N. E. 916; *Deming-Colborn et al. Co. v. Union Nat. S. & L. Ass'n*, 151 Ind. 463, 51 N. E. 936; *Goodwin v. Cunningham*, 54 Neb. 11, 74 N. W. 315; *Monroe v. Hanson*, 47 Neb. 30, 66 N. W. 12; *Green & Co. v. Sanford*, 34 Neb. 363, 51 N. W. 967; *Smith et al. v. Hurd et al.*, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661; *Hokanson v. Gunderson et al.*, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354; *Burbank v. Wright*, 44 Minn. 544, 47 N. W. 162; *Corser v. Kindred*, 40 Minn. 467, 42 N. W. 297; *Clark et al. v. Manning et al.*, 95 Ill. 580; *Lamb v. Campbell*, 19 Ill. App. 272; *Badger Lumber Co. v. Staley et al.*, 141 Mo. App. 295, 125 S. W. 779.

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Several of the cases cited by the defendants in error do not sustain their position for the reason that the statutes under which they were decided did not provide that the other claimants should be made parties, hence the ruling was that the limitation period only applied to those which the statute said should be made parties. We are not impressed with the reasoning in *Gaines v. Childers*, 38 Or. 200, 63 Pac. 487, which appears to support the claim of the defendants in error. It overlooks the fact that mechanics' liens are creatures of statutes. When the act creating them provides that certain persons (easy to ascertain) shall be made parties to suits for their enforcement the courts are not at liberty to say that they are not necessary parties when their rights are in any manner to be affected. To sustain the defendants in error's contention would be to say that the institution of a suit not against a party in interest where the statute says he shall be made a party stays the running of a statute of limitations in his favor. We cannot subscribe to this conclusion. This ruling makes unnecessary any consideration of the other assignments.

The judgment will be reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

No. 8775.

SCHOOL DISTRICT NO. 9, MESA CO. *v.* GIGAX, ET AL.

Decided January 7, 1918.

Action by teachers against a school board for breach of contract. Judgment for plaintiffs.

Affirmed.

1. SCHOOLS—*Teaching Contract.* A teacher's contract with a school board, the execution of which begins after the expiration of the term of office of one of the members, is not invalid for that reason, and the board will be liable for a breach thereof.

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Error to the District Court of Mesa County, Hon. Thomas J. Black, Judge.

Messrs. GRIFFITH, WATSON & SMITH, for plaintiff in error.

Mr. GEORGE BULLOCK, Mr. R. H. WALKER, for defendants in error.

En banc.

MR. JUSTICE SCOTT delivered the opinion of the court.

THE plaintiff in error is a school district of the third class as classified by the statutes of the state. As such, its board of directors consists of three members, one of whom is to be elected at the annual school meeting, and each of whom hold office for a term of three years.

At a regularly called meeting of the board of directors of defendant school district, held on the 14th day of March, 1913, the defendants in error, plaintiffs below, and who are husband and wife, were jointly employed to teach the schools of the district for a period of eight months, beginning in September, 1913, at the joint compensation of $155.00 per month. At this board meeting one member of the board opposed such employment. Afterward and at the annual school meeting in May, a new member of the board was elected to succeed one of those who had voted for such employment, and at a later meeting held in the same month, the board, by a vote of two to one, ordered the contract of employment cancelled, and so notified the plaintiffs.

This suit is to recover under the contract of employment. The case was tried to the court upon the pleadings, and judgment rendered in favor of the plaintiffs in the sum of $550.00 being for the amount agreed in the contract of employment, less the earnings of plaintiffs during the period, and necessary expenses to which they were put in obtaining such employment. The pleadings admit that plaintiffs were competent school teachers and were at all times mentioned, authorized by proper certificates to teach school.

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It was alleged in the answer of defendant district, that plaintiffs were at the time of the contract, and had been for two school years, employed as school teachers for the school district, and were unsatisfactory, and that this constituted the issue in the ensuing annual election. Fraud is not charged, although the answer alleged that the action was taken by a majority of the board to forestall any action of the board after the election.

The whole question is whether or not the district board had the power to make the contract at the time; the contention being that the board cannot contract for an employment to begin after the expiration of the term of one of the members of the board. This question was raised by demurrer to the complaint and otherwise.

The plaintiff in error to sustain its contention cites the following cases: *Stevenson v. School Dist.*, 87 Ill. 255; *Cross v. School Directors*, 24 Ill. App. 191; *Webster v. School Dist.*, 16 Wis. 336; *Hemingway v. School Dist.*, 118 Wis. 294, 95 N. W. 116; *Burkhead v. School Dist.*, 107 Ia. 29, 77 N. W. 491; *Smith v. School Dist.*, 1 Pennewill (Del.), 401, 42 Atl. 368.

It must be admitted that the Illinois cases do sustain the contention of plaintiff in error, but it is quite clear as pointed out in many of the cases hereinafter cited, that these cases are based on specific statutes of that state, nonexistent in this state and in other states, where the contrary view has been taken. One of the provisions of the statute of Illinois upon which that court based its conclusion was as follows:

"Every school established under the provisions of this act, shall be for the instruction in the branches of education prescribed in the qualifications for teachers and in such other branches, including vocal music and drawing, as the directors or the voters of the district, at the annual election of directors, may prescribe."

And from this the court reasoned that:

"Under this provision it could not be known, until after the annual election of directors, but that the voters of the

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district would prescribe, that certain branches should be taught beyond those ordinarily taught in district schools and there can, obviously, be no intelligent employment of a teacher until it shall be known what is required to be taught."

The remaining authorities cited by plaintiff in error cannot be said to support the contention. *Hemmingway v. School Dist., supra,* following *Webster v. School Dist., supra,* by the same court, sustained the validity of the contract in question subject only to the power of the district at its next meeting, or of the new board, to terminate the contract by an inconsistent determination as to the length of the term, the sex of the teacher, or the application of the school moneys. Under our statutes the school meeting has no such powers, but such matters are within the exclusive power of the board.

In *Burkhead v. School Dist., supra,* it was simply held that the school board was without power under the statutes of that state to contract with teachers for a period of five years. This was held to be an unreasonable length of time.

In *Smith v. School Dist., supra,* the contract was held to be invalid for the reason that the contract was made with individual members of the board and not made nor ratified by the board at a meeting duly convened. It is true that the writer of the opinion deprecates the policy of out going members in selecting teachers for a period beyond the terms of such members, though expressly declining to lay down any fixed rule upon this point. As we view it the question here is one of power and not of policy. But the following authorities are clearly opposed to the contentions of plaintiff in error, and expressly hold that in the absence of statutes, logically or expressly to the contrary, contracts of the kind under consideration, are binding on the school district. *Caldwell v. School Dist.,* 55 Fed. 372; *Reubelt v. School Dist.,* 106 Ind. 478, 7 N. E. 206; *Taylor v. School Dist.,* 16 Wash. 365, 47 Pac. 758; *Gates v. School Dist.,* 53 Ark. 468, 14 S. W. 656, 10 L. R. A. 186; *Norton v. Wilkes,* 93 Minn. 411, 101 N. W. 619; *Wait v. Ray,* 67 N. Y. 36;

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Splaine v. School Dist., 20 Wash. 74; *Town of Pearsall v. Woolls*, 50 S. W. (Tex.) 959; *Wheeler v. Burke*, 162 Ky. 143, 172 S. W. 91.

In *Wait v. Ray, supra*, involving the precise question, it was said:

"And it would be a strange construction of the statute which would terminate the teacher's contract with every such termination of the trustee's office. The power to employ teachers is, therefore, very wisely made general; and a contract for one year or more, if made in good faith, and without fraudulent collusion, must be held binding. This power, like every other power confided to public officers, may be abused, but the fact that it may be abused furnishes no argument against its existence. The danger of abuse is, however, very small, as a hiring for an unusual time would be strong evidence of fraud and collusion. * * *

The contention of the defendant would be more plausible if there were a general rule that public officers could make contracts to continue only during their terms of office, but there is no such general rule; and as to officers who have general powers to contract, unless there is some limitation of their power, their contracts may extend beyond their terms and bind their successors. The public exigencies demand that public officers should be clothed with such power, and protection against its abuse is found in official integrity, which is the rule rather than the exception, and also in the fact that contracts, the offspring of fraud or collusion, may be safely repudiated."

In discussing the same question it was held by the Supreme Court of the State of Washington, *Taylor v. School Dist., supra:*

"The district school board is a corporation representing the district. It is a continuous body. While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its individual members. An essential characteristic of a valid contract is that it is mutually binding upon both the parties to it. A

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contract by a school board the duration of which extends beyond the term of service of one of its members is not therefore invalid for that reason."

The cases cited by appellant, *Stevenson v. School Directors*, 87 Ill. 255, and *Davis v. School Directors*, 92 Ill. 293, discuss the statutes of Illinois creating school boards and lay stress upon provisions in those laws which are not contained in the laws of Washington."

The Supreme Court of Arkansas in *Gates v. School Dist., supra*, after distinguishing the Illinois cases, declares:

"It is contended that the selection of superintendents during each year should be left to the exclusive control of the board for that year. As a matter of policy, an argument might be made upon either side of that contention. There is nothing in the law to sustain the affirmative. Public interest might suffer from unwise contracts covering an extended term in future; they might suffer equally for want of power to make a contract when a good opportunity offered. But with the question of policy we have no concern, except in so far as it aids in ascertaining legislative intent. There is nothing in the act that implies that the legislature intended either more or less than it said. We therefore conclude that the act furnishes an accurate expression of legislative intent, and that there is no law that forbids the school board to make a contract for a superintendent for a term beginning after some members of the board go out of office. This conclusion is sustained by the weight of authority as well as by reason. *Reubelt v. Noblesville*, 106 Ind. 480 [7 N. E. 206]; *Wait v. Ray*, 67 N. Y. 38; *Tappan v. School Dist.*, 44 Mich. 500 [7 N. W. 73]; *Webster v. School Dist.*, 16 Wis. 337."

Enough has been said to indicate the general trend of judicial opinion upon the subject as appears from the authorities cited, and to indicate the line of reasoning. This court in the case of *School Dist. v. Hale*, 15 Colo. 367, 25 Pac. 308, in passing upon a similar contract of employment under our statutes, not now changed in that respect, said:

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"In the statute relating to schools, the board of directors is given full power to do whatever may be necessary for the due and regular management of the schools of their district. This in terms includes the hiring and discharge of teachers. This power, however, must always be exercised in obedience to the general principles of law governing contracts of this class, unless there be some specific restriction in the statute which prevents their application. There is nothing whatever in the statute which gives the board the right to make a contract for a specific term, at a specified price, which shall not be subject to the legal consequences of a breach. The power of employment and discharge is not in terms beyond the control of the general law. It was always true that where a contract of hiring was entered into between two parties for a fixed period at a definite price, the employer could not escape liability for a discharge without cause. If the contract was broken by the employer, a cause of action at once arose in favor of the one discharged, who might, upon the expiration of the period of hiring, recover the damages resulting from the breach."

It will be noted that under our statutes, school boards in districts of the third class have the following exclusive powers, Sec. 5925, Rev. Stat. 1908:

"First. To employ or discharge teachers, mechanics and laborers, and to fix and order paid their wages * * *.

Second. To enforce the rules and general regulations of the state superintendent, to fix the course of study, the exercises and the kind of text books to be used; * * *.

Third. To provide for school furniture and for everything needed in the school house, or for the use of the school board.

Fourth. To rent, repair and insure school houses.

Sixth. To hold in trust for their district all real or personal property for the benefit of the school thereof.

Seventh. To suspend or expel pupils from school, * * *.

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Eighth. To determine the number of teachers that shall be employed and length of time over and above three (3) months that the schools shall be kept; to fix the time for the opening or closing of schools, and for the dismissal of primary pupils * * *."

It is quite clear that to deny the validity of the contract in question is to repudiate both the language and intent of the legislature. It may be that the policy of the legislature is not a wise one but that is not a question for the courts.

It is urged by counsel that because the legislature has conferred the power upon the electors of the district to fix the levy for school purposes, that this must be construed as a limitation upon the power to employ teachers until after such levy has been made. This is not tenable. The board has the sole power to employ teachers, fix the number, the wage, and determine the time of employment. It might as readily be said that the board cannot purchase fuel, furniture, or make repairs, the extent of all of which in the very nature of things, must always remain uncertain and indeterminate.

No case has been cited and we know of none, where under statutes like or similar to ours, such powers have been vested exclusively in the school board, a contract has been held invalid for the reason assigned.

The judgment is affirmed.

No. 8783.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. EYSTER.

Decided January 7, 1918.

Action to recover damages for killing of livestock by railway company's train. Judgment for plaintiff.

Affirmed.

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1. RAILROADS—*Stock Killing Statute Construed.* Under chapter 135, S. L. 1911, relative to killing of stock by railroads, the owner of stock killed is bound by the procedure therein established only when the railroad company complies with its provisions, and if the company fails in this respect, the owner may bring an action under secs. 1, 2, 3 and 4 of the act to recover the actual value of the animals killed.

2. *Fencing Right of Way.* Failure of a railroad company to maintain a fence as required by the act, is negligence *per se*, and if such negligence is the cause of the accidental killing of stock, the owner may recover.

Error to the District Court of El Paso County, Hon. J. W. Sheafor, Judge.

Mr. WILLIAM V. HODGES, Mr. D. EDGAR WILSON, Mr. HAROLD H. HEALY, Mr. FRANKLIN E. BROOKS, Mr. GEORGE W. BIERBAUER, for plaintiff in error.

No appearance for defendant in error.

En banc.

MR. JUSTICE GARRIGUES delivered the opinion of the court.

In this action, brought to recover the value of livestock killed on defendant's railroad by a train, plaintiff alleges that along the railroad right of way the fence was broken down, and negligently permitted by the company to remain so defective as to allow animals to stray upon the railroad track. The answer denies the animals strayed upon the track and were killed by reason of defendant's negligence in failing to maintain a good and sufficient fence, or on account of its defective condition; alleged the railroad right of way where the animals were killed was inclosed with good and sufficient fences, gates, and cattle guards capable of keeping animals off the railroad, and that the fence was kept in good and proper condition of repair; and denies that its negligence was the cause of the accident. It then alleges that about three weeks prior to the accident there was an abnormal fall of snow, which drifted and so covered the fence that the animals walked on the drifted snow over

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the top of the fence onto the right of way and were killed; that plaintiff knew the condition regarding the snowdrifts, and failed to exercise ordinary care in keeping the animals inclosed, and negligently permitted them to run at large adjoining the right of way during the prevalence of such conditions. It then pleads its compliance, and plaintiff's noncompliance with what is usually termed the stock-killing statute. S. L. 1911, p. 400.

The animals were in an inclosed pasture or range adjoining the railroad, which was also inclosed. At a farm crossing the company had constructed and was maintaining a gate, and it was here the animals got onto the railroad. There was evidence that the gate had been partly destroyed by fire, which left it in a defective condition, with the top board down or entirely off, for a long time prior to the snowstorm, and, though often repaired, that the gate was not maintained at the proper height; that the snow had drifted against the gate and partly covered it; and that the animals walked on the snowdrift over the top of the gate onto the track and were killed by a train. The jury returned a verdict for plaintiff.

Garrigues, J., after stating the facts as above.

In 1911 the Legislature passed a comprehensive stock-killing statute. S. L. 1911, p. 400. This statute requires the railroad company to notify the nearest state livestock inspector and the section foreman when such an accident occurs on its railroad, and they together must inspect the animals. The inspector must estimate their value if killed, and the damages if the animals are injured, ascertain the owner's name, and report his findings to the secretary of the state board of stock inspection commissioners. After receiving such report, the secretary must send a copy of it to the owner, also to the railway company, and request it to pay the estimated value to the board for the use of the owner. The owner, after receiving from the secretary such copy of the inspector's report, may, if satisfied, file proof of ownership with the secretary and accept the estimated value, which, if he does, is a final settlement. If dissatis-

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fied, however, with the estimated value, but willing to arbitrate the damages, he may file proof of ownership and the amount of damages he claims with the board, and its award shall be final and binding upon each. But, after being so notified, he may decline to do either; that is, to accept the estimated value or to file his claim with the board, in which event he is required to file a demand with the station agent, and if he fails to do that within six months after the accident, when notified, his claim against the railway company is forever barred. If he pursues the latter course and files his demand with the station agent, then the company must within 30 days pay the full demand, if it does not, the owner may sue and recover the full damages, provided he brings suit within six months from the date of filing such demand with the station agent.

The suit in this case is not based upon the inspector's estimated value which the company failed to pay, nor upon the award of the board, nor upon the company's failure to pay within 30 days the demand filed with the station agent. The company did not comply with the statute and none of these things were done. The action is based upon sections 1, 2, 3 and 4 of the act to recover the actual value of the animals. It is only in the event the owner, after being notified, declined to accept the estimated value, or to file a claim with the board that he was required to file a demand with the station agent. He was not notified, and given an opportunity to file proof of ownership with the secretary and accept the estimated value or to arbitrate. The company neglected to notify the inspector, and there was no inspection so far as the record shows. The owner was required to file his demand with the station agent as required by section 10 of the act, only in the event he declined, after being notified, to accept the estimated value or to arbitrate. He had no opportunity to do either. Before the six months' statute could bar his right to recover, he first had to be notified and given an opportunity to accept or arbitrate. The railroad company's compliance with the act is a condition precedent to the requirement that the owner file proof

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of ownership as required by section 8, or a demand with the station agent as required by section 10. It is only in the event that the owner, after being notified, declined to accept the provisions of section 8, that he is affected by the provisions of section 10. Therefore the company's contention that the owner failed to file proof of ownership, and failed to file a demand with the station agent, and that the six months' statute of limitations bars the action, is not availing to it as a defense in this case.

Sections 1, 2, 3 and 4 of the act provide in substance that if the railway company fails to inclose its railroad with a good fence, gates, and cattle guards amply sufficient to prevent animals from getting on the railroad, it shall be absolutely liable to the owner for all live stock killed or injured by trains on the railroad; if it duly builds and keeps in sufficient repair such fences, gates, and cattle guards, it will not be liable, and it may plead and prove compliance as a defense. The statute makes the mere happening of such an accident *prima facie* evidence of negligence and provides that the company must pay full value for all damages, unless it show affirmatively on the trial that the accident was not caused by its negligence. This suit is based upon the alleged negligence of the company for failure to maintain a fence amply sufficient to prevent animals from getting upon the railroad. It is not to recover a penalty, but is to recover compensation for actual damages. It is a remedial right given by statute to recover the actual value of animals killed through the company's negligence in failing to comply with the statute. Failure to maintain a fence as required by the act is negligence *per se*, and, if that was the cause of the accident, plaintiff could recover.

There was evidence on the trial that the fence at the farm crossing where the animals got upon the track was in a defective condition some time prior to the snowstorm. The jury could have found under the evidence that, if the gate at the farm crossing had been kept and maintained in the condition required by the act, the animals would not have gone upon the railroad. If this is true, the failure to

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properly maintain the gate was the proximate cause of the accident. We have read the entire record, including the instructions given and refused, and carefully considered the statute. We think the jury was properly instructed; we have found no errors of sufficient importance to reverse the judgment, and it is therefore affirmed.

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September Term, 1920

No. 9691.

MARTIN *v.* UNION PACIFIC RAILROAD COMPANY.

Decided July 6, 1920. Rehearing denied October 4, 1920.

Action by a shipper against a common carrier for damages alleged to have resulted from delay in delivery of livestock. A general demurrer to the complaint was sustained. *Reversed.*

1. PLEADING—*Partnership.* A complaint alleging an association of companies as common carriers is not insufficient because allegations concerning the agreement between the companies do not show a partnership, when there is no claim that they were partners.

2. CONTRACT—*Common Carriers—Joint Obligation.* A complaint alleged that two companies were associated together with another for transporting freight as common carriers; that plaintiff entered into an agreement with the association which made the act of one, the act of all. *Held*, that a breach of the contract, whether occurring upon one line or the other, is a breach to which both companies are parties and is a joint obligation. The fact that the suit might have been brought against the initial carrier is immaterial.

Error to the District Court of the City and County of Denver, Hon. Francis E. Bouck, Judge.

Mr. H. A. HICKS, Mr. J. G. SCHWEIGERT, Mr. JOHN L. SCHWEIGERT, for plaintiff in error.

Mr. THOMAS R. WOODROW, Mr. C. C. DORSEY, Mr. R. L. STEARNS, Mr. EDWARD G. KNOWLES, for defendant in error.

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Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error brought suit against defendant in error for damages alleged to have resulted from delay in the delivery of two carloads of hogs, shipped by plaintiff from Blackfoot, Idaho, over the line of the Oregon Short Line Railroad Company, and that of the defendant in error. A general demurrer to the complaint was sustained; and the plaintiff, having elected to stand upon his complaint, brings the case here for review.

The complaint alleges, among other things, that the said two railroad companies were: "Associated together for the purpose of carrying and transporting livestock freight as common carriers, and which said association, together with another railroad company, constituted and was known as the Union Pacific Railroad System; that each of said associate members of said system was fully authorized to enter into contracts for the shipment of livestock freight over said system, and that there was a contractual understanding and agreement between the constituent companies of the said the Union Pacific Railroad System respecting through livestock freight shipments originating on one of said railroad lines and carried in part thereon, and carried in part and terminated on another of said railroad lines; and that each of the constitutent companies of said system was empowered to enter into a through livestock freight contract with the shipper on behalf of all of said constituent companies."

Attached to and made a part of the complaint is a livestock contract which is headed:

"UNION PACIFIC SYSTEM
Union Pacific Railroad Company.
Oregon Short Line Railroad Company.
Oregon-Washington Railroad & Navigation Company."

The only grounds upon which it is contended that the complaint is insufficient which require consideration are

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that the allegations concerning the agreement between the two companies do not show a partnership; and, further, that said agreement requires them to do only what they would be bound to do under the law.

As to the first matter, there is no claim that the companies are partners in any sense. The second ground, if true, affords no reason for the sustaining of the demurrer. The allegation is that the parties have entered into such an *agreement* as makes the act of one the act of the other. That being so, the contract entered into in the name of the initial line is also the contract of the defendant in error. A breach of that contract, whether occurring upon one line or the other, is a breach of the contract to which both companies are a party. It is a joint obligation. The fact that suit might have been brought against the initial carrier had no bearing on the case.

The complaint states a cause of action against the defendant and the sustaining of the demurrer was error, for which reason the judgment is reversed.

Mr. Justice Allen and Mr. Justice Burke concur.

No. 9625.

BINKLEY v. SWITZER.

Decided July 6, 1920. Rehearing denied October 4, 1920.

Action by plaintiff in error asking to be adjudged the owner and entitled to the possession of certain real estate. Judgment for defendant.

Reversed.

1. PROBATE LAW—*Wills—Right of Election of Widow.* The probating of the will of a husband does not deprive the widow of her right thereafter to elect whether to take under the will or under the statute.

2. JUDGMENTS—*Service of Summons.* The return on a summons shown in evidence was to the effect that the parties held to be in

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default, were not found. It was contended that a judgment against them was void for want of jurisdiction of the person. *Held*, that where a part of the record only, was in evidence, the record withheld might contain evidence of service and the general presumption in favor of the judgment must prevail.

3. JUDGMENTS—*Void—Collateral Attack.* Judgments rendered upon matters not presented for litigation by the pleadings are void and subject to collateral attack.

4. HEIRS—*Widow.* The contention that a widow is not an heir of her deceased husband is contrary to the holding of the court in *Anderson v. Groesbeck*, 26 Colo. 3.

5. WILLS—*Bequests.* A will devised to the widow an undivided half of the estate of decedent for life, remainder to a brother and sister and three children and the residue to another. The widow elected to renounce under the will and take under the statute. A judgment declaring void a part of the bequests, held objectionable; the interest of the widow should be derived from the entire estate and the interests of the beneficiaries abated proportionally under section 7239 R. S. 1908.

Error to the District Court of Chaffee County, Hon. James L. Cooper, Judge.

Mr. GEORGE A. MILLER, Mr. JOHN T. BOTTOM, Mr. WALLACE SCHOOLFIELD, for plaintiff in error.

Mr. G. K. HARTENSTEIN, for defendant in error.

Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error was plaintiff in an action against defendant in error in which he sought to be adjudged the owner, and entitled to the possession of certain real estate in possession of the defendant. The court found for the defendant, and entered judgment accordingly. Plaintiff brings error.

The facts necessary to be considered in this cause are briefly as follows: One Philo Weston, by his will, devised to his wife, Mary Weston, an undivided half of all his estate for life; remainder over to his brother and his

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sister, and to three children of his wife by a former marriage. The residue of his property he gave to one Coltern, with a provision that should he die leaving no legal heirs surviving him, the said portion should then be divided between the above named persons who are to take after the death of the wife. A decree admitting the will to probate was duly entered in the county court.

Something over two years thereafter, the widow filed her complaint in the district court alleging the facts above stated, and further that she had no understanding of the will, and never assented to its provisions by which her rights had been taken away, and that one Dean, the executor, and Coltern, the above named devisee, had assumed control of the entire estate, and refused to recognize that she had any rights therein. She prayed that the will be set aside as to a half interest in the estate; that she be decreed to be the owner of a half interest, and that the defendant Coltern be required to convey to her an undivided one-half of said real estate, and to deliver to her one-half of the personal property.

Dean and Coltern were the only defendants named in the original complaint. Later an amended complaint was filed in which the plaintiff in error and the other persons named in the will as beneficiaries, aside from Mrs. Weston and Coltern, were added as defendants. The court found that defendants Weston, Wing, Binkley, Robinson and Martha Switzer had been duly served, but failed to appear. The court further found that said will, so far as it attempted to devise one-half of the said estate to the plaintiff Mary Weston for life and after her death to the other persons named, should be canceled, and that the said parties should take nothing under said will. The cause was dismissed as to Dean. Nothing was adjudged as to Coltern.

Defendant in error, Switzer, in answer to the complaint of plaintiff in error, set up the decree in the cause last mentioned, and alleged that the said Mary Weston had conveyed to Coltern an undivided half interest in the lands

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and premises mentioned, and that Coltern had conveyed the same to Switzer, defendant in error. Plaintiff, by way of replication, set up a number of matters tending to show that the decree relied upon in the answer is void, only a part of which need be considered.

Plaintiff in error contends: First, that the decree of the county court in probating the will is conclusive upon the widow's rights. Such is not the case. The probating of the will did not deprive the widow of her right thereafter to elect whether to take under the will, or under the statute. *Hodgkins v. Ashby*, 56 Colo. 553, 139 Pac. 538.

It is next contended that a return on the summons, which was pleaded and shown in evidence, to the effect that the parties held to be in default, as above stated, were not found, is conclusive that the judgment is void for want of jurisdiction of the person. Several cases from this court are cited on this question, but they do not support counsel's contention.

The law is well settled that, to warrant a finding against the recitals of a judgment, it must appear from the whole record that such recitals are not true. When the entire record is in evidence, there can be no presumption that something was done which the record does not show to have been done. It is otherwise when the whole record is not before the court. In *Hargis v. Morse*, 7 Kans. 418, the court, by Justice Brewer, said: "A party may not introduce part of a record, and relying on presumptions, withhold the remainder." It is evident that the part of the record withheld might contain evidence of service. When only a part of the record is produced, there is nothing to rebut the presumption in favor of the jurisdiction of the court as indicated by its recital in the judgment. *Turner v. Jenkins*, 79 Ill. 228.

Had the entire record been introduced in evidence, there being no evidence of service, it would then be reasonably presumed that the summons now in evidence was the only summons issued. As it is, the general presumption in favor of the judgment must prevail.

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A further contention made by the plaintiff in error is that the decree is void as to the plaintiff in error because the judgment covers matters not embraced within the pleadings, in that plaintiff in error, and several other defendants named in the title of the cause, were not mentioned in the body of the complaint, and no relief was demanded against them. This contention is well founded.

In *Hume v. Robinson,* 23 Colo. 359, 47 Pac. 271, the court quoted with approval from *Jones v. Davenport,* 44 N. J. Eq. 33, 13 Atl. 652, as follows: "The principle is authoritatively settled, that a decree or judgment, on a matter outside of the issue raised by the pleadings, is a nullity, and is nowhere entitled to the least respect as a judicial sentence." This court then adds: "The only exception to be noted to this doctrine is where the defendant appears, and takes part in the actual litigation of the matter determined; in which event he will be bound by the judgment, although outside of matters put in issue by the pleadings. Otherwise, the rule is universal that the judgment is inclusive only of matter so put in issue." To support the above statement this court cites *Reynolds v. Stockton,* 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464; *Munday v. Vail,* 34 N. J. L. 418; in both of which cases judgments rendered upon matters not presented for litigation were held to be void, and subject to collateral attack.

In *Unfried v. Heberer,* 63 Ind. 67, it appeared that the complaint in foreclosure named the widow and children of the deceased mortgagor as parties, alleging that they were interested as heirs of the mortgagor. A foreclosure decree was entered by default against the widow. Thereafter she asserted rights in the premises as widow, and in respect to the default decree the court said: "When the said Anna (the widow) made default in the action for foreclosure, nothing was taken against her as confessed, nor could have been, which was not alleged in the complaint; and, as nothing was alleged hostile to her claim as widow, it follows that nothing concerning her claim as such widow was concluded against her by the judgment of foreclosure." See

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also *Burns Co. v. Doyle*, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235; *State v. Haverly*, 62 Neb. 767, 87 N. W. 959; 23 Cyc. 818. Certainly, then, where no claim was made against the parties now in question, no rights of theirs alleged to be involved, and no relief was demanded against them, a judgment which determines their rights under the will has nothing to support it and is void. It is unnecessary to consider the other grounds on which it is claimed that the judgment is void.

It is further urged that the court erred in holding that Martha Coltern, widow of Isaac Coltern, was his legal heir; counsel contending that a widow is not an heir of her husband. Such holding, however, if wrong, is not subject to review on collateral attack; but it may be observed, in passing, that in *Anderson v. Groesbeck*, 26 Colo. 3, 55 Pac. 1086, we held contrary to counsel's contention.

Counsel object to the judgment, also, because it declares void a part of the bequests, leaving the Coltern interest intact, whereas the interest of the widow under the statute should be derived from the entire estate, the interests of the beneficiaries being abated proportionally. The objection is well founded. Section 7239, R. S. 1908, so provides.

For the reasons above stated the judgment is reversed.

Mr. Justice Allen and Mr. Justice Burke concur.

No. 9909.

NOLAND, SECRETARY OF STATE v. HAYWARD ET AL.

Decided September 22, 1920. Rehearing denied October 4, 1920.

Action to determine the sufficiency of an initiative petition. Held insufficient by the district court.

Reversed.

1. INITIATIVE AND REFERENDUM—*Submission clause.* Under secs. 1 and 3, laws of 1919, p. 431, to the effect that an initiative petition shall contain a "submission clause" before being signed by

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electors, a petition which contains a ballot title together with the words "yes" and "no" and blank spaces opposite thereto, may be deemed to comply with the requirements of the Act concerning submission clauses.

2. WORDS AND PHRASES—"To submit", defined.

Error to the District Court of the City and County of Denver, Hon. C. J. Morley, Judge.

Hon. VICTOR E. KEYES, Attorney General, Mr. WILLIAM R. RAMSEY, Assistant, Messrs. ALLEN & WEBSTER, for plaintiff in error.

Mr. MILTON SMITH, Mr. CHARLES R. BROCK, Mr. W. H. FERGUSON, Mr. L. J. WILLIAMS, Mr. JOHN T. BOTTOM, Mr. JOHN G. REID, for defendants in error.

Mr. HORACE N. HAWKINS, Mr. CLARENCE M. HAWKINS, Mr. CARLE WHITEHEAD, Mr. ALBERT L. VOGL, *Amici Curiae.*

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is a cause which is before us, under section 3, Chapter 97, Session Laws of 1913, for a summary review of a decision of the District Court of the City and County of Denver, which adjudged a certain initiative petition to be insufficient.

On May, 20, 1920, certain persons submitted to the Secretary of State a draft of an initiative petition for a proposed law, creating a new county, to be enacted or voted upon by the people. This step was evidently taken under that part of section 1, Chapter 131, Session Laws of 1919, which reads as follows: "Section 1. That on and after the passage of this act, the original draft of all initiative petitions for proposed laws to be enacted by the people shall, before they are signed by the electors or any of them, be submitted with a copy thereof to the Secretary of State without any title thereto, submission clause or ballot title, providing the designation for or against which the voters shall express their choice for or against said proposed law; * * *."

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Thereafter on the same day the Secretary of State, assisted by the Attorney General and the Reporter of the Supreme Court acted, or attempted to act, under a further provision of section 1 of the act of 1919, reading as follows: "* * * That within three days after such submission, the Secretary of State shall call to his assistance the Attorney General and the Reporter of the Supreme Court, the three of which, a majority controlling, shall, within five days thereafter, designate and fix a proper and fair title for said proposed law; also its ballot title and submission clause, which shall correctly and fairly express the true intent and meaning of the act, and immediately thereafter deliver the same with the original to the parties presenting it, keeping the copy with a record of their actions thereon." The Secretary of State, the Attorney General and the Reporter of the Supreme Court, on the date above named and under the statutory provision above quoted, designated and fixed a title to the proposed law, set forth in the initiative petition in question, and also designated and fixed its ballot title. The title to the proposed law begins with the words: "An act to establish the county of Limon." The ballot title is: "An Act Creating the County of Limon." After the above stated action was taken, the Secretary of State caused to be prepared and inserted in the original petition, and in the copy required by law to be retained as a record in his office, the following: "The Secretary of State, Attorney General and Reporter of the Supreme Court do hereby designate and fix as the ballot title to the proposed initiated measure herein, the following":

An Act Creating the County of Limon	Yes	
	No	

On June 29, 1920, the petition, containing the foregoing title, and the insertion above quoted, including the ballot title with the words "yes" and "no" and blank spaces opposite thereto, was filed in the office of the Secretary of State. On July 13, 1920, a protest was filed against the petition.

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The principal ground of the protest was that the petition or petitions contained no "submission clause," and that the signatures to such petition or petitions were obtained "before any submission clause was added." On July 27, 1920, after a hearing upon the protest, the same was, by the Secretary of State, overruled, and the initiative petition was found and held to be sufficient. Thereafter the parties to the protest had this finding reviewed by the District Court of the City and County of Denver. That court, on August 16, 1920, after due proceedings had, made the following finding: "That no submission clause was prepared by the Secretary of State, the Attorney General and the Reporter of the Supreme Court, or by any of them, and no submission clause was inserted in the petition prior to its circulation, or at all, and accordingly the court finds that the petition is insufficient in form and that the signatures procured thereto are of no force or effect whatever." Upon that finding the court adjudged that the petition is insufficient in form and that the signatures thereto are without any force or effect. The foregoing is the decision which is before us for review.

The question to be determined is, Does the petition contain a submission clause? If it does not contain such clause, then the judgment of the district court is right under section 3 of the act of 1919 which provides that, "No petition for any initiative measures shall be circulated nor any signature thereto have any force or effect which has been signed before the titles and submission clauses have been added in the manner herein provided."

Neither the initiative and referendum amendment to the constitution, nor any statute prior to that of 1919, above cited, defines or even uses the term "submission clause", and the act of 1919 uses the expression without stating what a submission clause is. A clause may be a subdivision of a document. 11 C. J. 830. In this sense, a ballot title, as described in Chapter 97, Session Laws of 1913 and the words "yes" and "no" with the blank spaces to the

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right and opposite the same, as provided for by the same act, constitutes a "clause." Furthermore it is a clause which submits the proposed measure to the voters for their adoption or rejection. It is, therefore, a submission clause. To submit means to present and leave to the judgment of the qualified voters. 4 Words & Phrases, 736. In *People v. Perkins*, 56 Colo. 17, 137 Pac. 55, Ann. Cas. 1914D, 1154, this court used the expression "submission clause" in referring to a ballot title or to the matter which went upon the ballot and which was before the electors at the time they cast their respective votes for or against the initiated measure.

We are of the opinion that the initiative petition in question contains a submission clause, within the meaning of the act of 1919,—that the ballot title, together with the words "yes" and "no" and the blank spaces opposite thereto, may be deemed to be such submission clause.

The decision of the district court is reversed, and the cause remanded with directions to enter judgment in accordance with the views herein expressed.

Mr. Justice Scott and Mr. Justice Teller not participating.

Mr. Justice Denison dissents.

Denison, J., dissenting.

I think the judgment of the District Court is right. Some of my colleagues think the ballot title and submission clause, referred to in S. L. 1919, 431-2, are one and the same. That cannot be, because the statute refers to three things, title, ballot title and submission clause. It cannot grammatically be construed to refer to but two.

Others think the words "Yes" and "No" in the ballot title are not a part thereof but constitute the submission clause. It seems clear to me that they are a part of the ballot title and cannot be conceived to be a submission clause at all, but if they could they do not comply with the requirement of the statute that the submission clause

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"shall correctly and fairly express the true intent and meaning of the act."

Under section 3, therefore, the petition in question could have no force or effect.

No. 9686.

RAPE ET AL. v. THE NESS MUSIC CO.

Decided October 4, 1920.

Action in replevin to recover possession of a piano. Judgment for plaintiff.

Affirmed.

1. APPEAL AND ERROR—*Abstract of Record.* Errors assigned to rulings on admission of evidence and the giving and refusal of instructions will not be considered by the appellate court where the abstract contains neither the evidence nor any of the instructions.

2. *Error Waived.* Error in the description of plaintiff as a corporation, which is corrected by the trial court without objection, is not available on review.

Error to the County Court of the City and County of Denver, Hon. George W. Dunn, Judge.

Mr. DUNCAN MCPHAIL, for plaintiffs in error.

Mr. F. J. KNAUSS, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error brought suit in replevin to recover a piano from plaintiffs in error, and had judgment. On appeal to the County Court, the plaintiffs in error were again defeated and have brought the case here for review. They assign and argue several errors, including rulings on evidence, and the giving and the refusal of instructions, but the abstract contains neither the evidence nor any of

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the instructions. Such errors can not, therefore, be considered. The principal complaint is that the plaintiff recovered possession of a piano, without having returned to the defendants a piano taken in part payment for the piano recovered. A supplemental abstract filed by defendant in error shows that the old piano was taken to the residence of the defendants, and that they refused to receive it. It is also urged that the judgment should be reversed because of the overruling of defendants' motion to vacate the judgment because of an alleged error in describing the plaintiff as a corporation, when in fact there was no such corporation. Inasmuch as the record shows that the court allowed the title to be corrected in the respect mentioned, without objection thereto by defendants, the alleged error is not now available to them.

No error appearing on the record, the judgment is affirmed.

Chief Justice Garrigues and Mr. Justice Burke concur.

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No. 9452.

THE PEOPLE, EX REL. v. HUMBERT.

Decided May 20, 1920. Rehearing denied December 6, 1920.

Disbarment proceedings. Petition granted.

1. ATTORNEY AND CLIENT—*Disbarment.* An attorney who received money for his client, retaining it for about 18 months while denying that he had it, and who made false statements under oath in an investigation concerning the matter, was disbarred.

Mr. BENJAMIN GRIFFITH, Mr. JOSEPH D. PENDER, for relator.

Mr. VICTOR E. KEYES, attorney general, Mr. THOMAS WARD, JR., for respondent.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THIS is a proceeding for disbarment for unprofessional conduct consisting of misrepresentation to a client and withholding her money while saying he had not yet received it.

One Mrs. Lipperd employed respondent as her attorney to look after certain matters in the United States Land Office in Durango and in the General Land Office at Washington. During his employment she became entitled to receive certain sums from the Government. These moneys were forwarded to her in two drafts or warrants, payable to her at sight, drawn on the U. S. Treasurer; one dated July 14, 1916, for $94.22 and the other dated August 8, 1916, for $160.00. She took each warrant, shortly after she received it, to respondent, indorsed it and left it with him. He cashed them both. He kept no account of the money, except a pencil memorandum which is not in the record, and gave her no receipt.

In January, 1918, she employed Mr. J. A. Pulliam, attorney, of Durango, who wrote to the General Land Office,

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learned of the cashing of the warrants and informed her of that fact by letter, advising her to see respondent, let him know she knew he had received the money and demand it again. February 9th, 1918, on her demand, he paid her $100 and shortly afterward paid her the balance in full.

The above facts are undisputed.

Mrs. Lipperd testifies that respondent told her the warrants would have to be sent to Washington and checks or drafts issued in lieu thereof, and that she gave them to him for that purpose, and that from that time till the day he paid her the $100, (about eighteen months), he continually informed her he had not heard from them and had not received the money.

The respondent claims that the warrants were given to him by Mrs. Lipperd to be cashed and the proceeds kept by him subject to her order, so that she might have the money ready when she should need it to pay the Government for some land which she had entered; that he kept it subject to her order and that she could have had it at any time; that she hoped to loan it but did not. He denies that she ever asked him for it until the day he paid the $100.

Mrs. Lipperd denies these matters and says she at all times wanted to lend the money to her brother and no one else.

The evidence for the people, if true, shows respondent guilty of unprofessional conduct in two respects: 1. He falsely represented that the warrants would have to be sent to Washington and exchanged for other paper before the cash could be obtained. 2. He retained the money after he got it and falsely represented to her that he did not have it. The first rests only on the statement of Mrs. Lipperd and he denies it positively. His conduct and hers is consistent with either, so we must say that it is not clearly and satisfactorily proved. In the second, however, she has strong corroboration both by witnesses and undisputed circumstances.

It is unnecessary to review the evidence in detail. It is enough to say that Mrs. Lipperd's knowledge that respond-

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ent had the money in trust for her is essential to his defence, and that we regard her conduct in employing and paying Pulliam, taken with the rest of the evidence, as such strong corroboration of her denial of knowledge that we cannot doubt her truth, and as sufficient to overcome the evidence on his behalf.

The conclusion seems unavoidable that respondent received the money and held it eighteen months while denying to his client that he had it. This constitutes unfaithfulness to his client, which is conduct unbecoming an attorney. It follows, also, that his statements, under oath, in this proceeding have been false. His name, therefore, must be stricken from the roll of attorneys.

No. 9669.

TREAT v. SCHMIDT, ET AL.

Decided June 7, 1920.

Action for cancellation of deed. Judgment for defendants.

Reversed.

1. APPEAL AND ERROR—*Findings on Questions of Law.* Where on the undisputed evidence, an issue of law is presented, the court of review is not bound by findings of the trial court thereon.

2. PRINCIPAL AND AGENT—*Agency to Sell Real Estate.* One who undertakes to sell the land of another at a stipulated price becomes the agent of the owner.

3. *Purchase by agent.* An agent to sell cannot purchase the property for himself unless he makes known to his principal that he is such purchaser and acquaints him with all the facts.

4. CORPORATIONS—*Chargeable with Knowledge of Directors.* A corporation is chargeable with knowledge of its organizers, who also constitute a majority of its board of directors, concerning the invalidity of a deed through which it acquires title to property.

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5. TENDER—*In Action for Cancellation of Deed.* In an action for the cancellation of a deed, a statement in the complaint that plaintiff brings the sum received for the property into court for delivery to defendant, constitutes a sufficient tender.

Error to the District Court of Las Animas County, Hon. A. C. McChesney, Judge.

Mr. D. J. DAVIES, for plaintiff in error.

Mr. A. E. MCGLASHAN, Mr. W. B. MORGAN, for defendants in error.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiff in error, by suit, sought to have cancelled a deed by which he conveyed to the defendant in error, Schmidt, certain lands in Las Animas County, and for an accounting as to coal produced therefrom. The defendants had judgment, and the case is now before us for review. The complaint alleged that the conveyance was invalid; first, because it was induced by misrepresentation and fraud; and, second, because the land was conveyed to defendant Schmidt when he was plaintiff's agent to sell it.

In February, 1914, Schmidt, a resident of Trinidad, wrote plaintiff, then residing in New York, in relation to the assessment of plaintiff's lands, stating, among other things, that the assessor had "recognized the fact at last that Section 31 is mined out," that being the land involved in this action, and he further stated that he was a partner of a former agent of plaintiff. On May 1, 1914, Schmidt inquired what plaintiff's price was on "the land that had been mined out," stating that he had an inquiry as to plaintiff's price. He also said, that the inquirer would pay only the price usually paid for grazing land, i. e., from three to five dollars per acre. There was further correspondence between the parties concerinng the title, and assessment of said lands, and mention was several times made by Schmidt of inquiries as to the sale of this and other lands owned by plaintiff. Under date of April 4, 1916, Schmidt wrote

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plaintiff a letter concerning title to the land here involved, and containing the following:

"This land you mentioned that was heretofore leased to The Colorado Fuel & Iron Company and which has the coal mined out is not worth very much and never will be worth much, as it is no good for agriculture, and about all the value it has is for pasture for goats.

I know a party that would purchase it if you would sell it cheap but I do not think you can get over $300 for this quarter section."

A few days later he wrote again saying that he had a prospective buyer, and that plaintiff should act promptly lest the buyer change his mind before the sale was completed.

On April 20, 1916, he again wrote that he had a buyer; and on May 6, 1916, he requested plaintiff to execute and return enclosed deeds, with draft for $400.00, which he promised to take up. He said "I have put myself as grantee to expedite matters."

The deeds were executed and delivered, and the money paid. A short time thereafter Schmidt conveyed the land to the other defendant in error, a corporation organized by him, and of which defendant Schmidt, his wife and one Garcia, constituted the board of directors when the conveyance was made. A lessee of said company took from said land from twenty thousand to twenty-two thousand tons of coal. Schmidt denies that the deed was obtained by fraud, and that he was the agent of plaintiff for the sale of the land.

We are of the opinion that the evidence does not establish a fraudulent intent on the part of defendant Schmidt. We cannot, however, agree with the trial court that he was not the plaintiff's agent to sell the land when he took title to it. We are not bound by the court's finding on that question, because the relation of the parties, on the undisputed evidence, is a question of law. The correspondence in evidence establishes the agency. Schmidt undertook to sell

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plaintiff's land at an agreed price, and that establishes his agency.

In *Fisher v. Seymour*, 23 Colo. 542, 550, 49 Pac. 30, 33, after holding as above stated, this court said:

"The law requires the utmost good faith on the part of an agent when dealing with his principal, and it is well settled that an agent, to sell, can not purchase the property for himself, unless he makes known to his principal that he is such purchaser, and acquaints him with all the facts."

In *Tyler v. Sanborn*, 128 Ill. 136, 21 N. E. 193, 4 L. R. A. 218, 15 Am. St. Rep. 97, it is said:

"An agent can not, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency, without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal."

This inhibition applies regardless of the good faith of the agent. *United States v. Carter*, 217 U. S. 286, 30 Sup. Ct. 515, 54 L. Ed. 769, 19 Ann. Cas. 594. The law does not allow an agent to occupy a position in which he may be tempted to betray his trust.

It follows that the deed from plaintiff to defendant Schmidt was voidable, and that the plaintiff was entitled to have it cancelled. Since the corporation defendant was a creature of Schmidt's, and he and his wife constituted a majority of the directory, it must be held that that company had knowledge of the invalidity of the deed. It is therefore in no better position than is Schmidt himself.

It is contended, however, that plaintiff had no cause of action because no tender had been made of the $400.00 received by plaintiff. The trial court found that no tender was made prior to the institution of the suit. Plaintiff was suing in equity for a rescission of the contract and tendered said sum to the defendant. He alleged, in the usual form, that he now brought the said sum into court for delivery to the defendants.

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In *Gould v. Cayuga County National Bank*, 86 N. Y., 75, in an action for a rescission, the court said:

"In such a case it is sufficient for the plaintiff to offer in his complaint to restore to the defendant what he has received, and the rights of the parties can be fully regulated and protected in the judgment to be entered."

In *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571, the court, speaking of actions to rescind, says:

"In such actions the plaintiff does not proceed upon the theory of a contract already avoided on the ground of fraud, but upon the theory that the jurisdiction of equity is needed to accomplish that end and to give such incidental relief as the plaintiff may be entitled to. It is sufficient in such a case to show by the complaint a willingness to do equity. The distinction must be kept in mind, in order to properly apply the rule under consideration, between an action in equity to rescind a contract and the rescission of the contract by the act of the party followed by an action at law for a recovery by such party of the money or property he parted with upon the faith of such contract."

The tender in the complaint was sufficient. The deeds should be cancelled, and the defendants ruled to account to plaintiff, as prayed in the complaint.

The judgment is accordingly reversed, with directions for further proceedings in accordance with the views above expressed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BURKE concur.

NOS. 9678, 9679.

REGAN AS ADMINISTRATOR, *v.* TURNER, ET AL.

Decided June 7, 1920. Rehearing denied October 9, 1920.

Actions by an administrator to recover personal property and set aside a deed. Judgments for defendants.

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Reversed.

1. FRAUD—*Conveyance of Property.* The transfer of all one's property to secure support for the remainder of grantor's life, is fraudulent as against his existing creditors.

2. PROBATE LAW—*Power of Administrator to Bring Actions.* The question of whether the administrator could maintain the actions, resolved in his favor on the authority of *Grover v. Clover*, 69 Colo. 72.

Error to the District Court of Weld County, Hon. Neil F. Graham, Judge.

Mr. ELBERT C. SMITH, for plaintiff in error.

Mr. WILLIAM R. KELLY, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

REGAN, Administrator, brought two suits against Robert and Julia Turner, one to recover personal property alleged to belong to the intestate and the other to set aside a deed of real estate from the intestate to the defendant. They were tried together, the trial was to the court, the judgment was for the defendants and the plaintiff, Regan, brings error.

About January 12th, 1918, Mary J. Ramsdell, then about eighty-six years of age, transferred all her property, $2,000 to $2,500 in value, to the defendant, Julia Turner, her daughter. April 12th, 1918, Mrs. Ramsdell died.

The plaintiff was appointed administrator. A claim against the estate in favor of Laura Forrest, wife of the intestate's grandson, having been allowed in the sum of $1,050, the administrator, after demand, brought the said suits.

The evidence showed that Mrs. Ramsdell executed the deed and transferred the personal property in consideration of Mrs. Turner's oral agreement to care for her mother for the rest of her life and to pay a sister $50 and two other sisters $25 each. She cared for her mother until her death

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and paid $45 on account of the $100 which was to be paid to the sisters.

Two main questions are argued in this court,

1. Was the transfer to Mrs. Turner valid as against the creditors?

2. Can the administrator maintain the actions?

As to the first point: It is held in this State that the transfer of all of one's property to secure support for the remainder of the grantor's life is fraudulent as against his existing creditors. *Fahey v. Fahey*, 43 Colo., 354, 357, 96 Pac. 251, 18 L. R. A. (N. S.) 1147, 127 Am. St. Rep. 118. The promise to pay the grossly inadequate sum of $100 does not relieve the transaction of constructive fraud. *Nugent v. Foley*, 137 N. Y. Supp. 705, 707. The transfers then were voidable by creditors.

The second question is settled in favor of plaintiff in error by *Grover v. Clover*, 69 Colo. 72, 169 Pac. 578.

The point is made that it is not shown that the debt existed at the time of the transfer but we think that the evidence is sufficient for that purpose.

The judgment should be reversed with directions to enter judgment in both cases for plaintiff, setting aside the transfer to an extent sufficient to satisfy the costs of administration and such claims as shall be allowed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE SCOTT concur.

No. 9685.

VAN GILDER AS RECEIVER OF THE GERMAN AMERICAN INDEMNITY CO. v. PARKER.

Decided June 7, 1920. Rehearing denied October 9, 1920.

Action on promissory note. Judgment for defendant.

Reversed.

1. BILLS AND NOTES—*Promissory Note.* A promissory note executed

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and delivered to an indemnity company to secure its policy holders, cannot be surrendered until the last of the policy holders is satisfied in full, and the facts that the policies have been reinsured and that the receiver of the company holds sufficient funds to secure all outstanding policies, cannot avoid this conclusion.

2. RECEIVERS—*Duties.* A receiver should sue on a note in his hands for the reason, among others, to escape the statute of limitations.

3. APPEAL AND ERROR—*Order—Presumption.* A judicial order not presented to the court for review, will be presumed to be lawful.

Error to the District Court of Routt County, Hon. John I. Mullins, Judge.

Mr. D. J. DAVIES, for plaintiff in error.

Mr. L. J. STARK, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

VAN GILDER, Receiver, brought suit in the District Court of Routt County against Parker on a promissory note and for foreclosure of a mortgage securing the same. The defense was that the note was accommodation paper without consideration. The cross-complaint demanded its surrender. The defendant had judgment and upon the cross-complaint the note was ordered surrendered. The plaintiff brings error.

Upon the trial the defendant was the only witness. He testified that the note was given to the German American Indemnity Company to be put up with the Commissioner of Insurance as part of the security required by statute, §§ 3098, 3099, R. S. 1908, for the benefit of policy holders.

The plaintiff was appointed receiver by the District Court of Denver. That court ordered the commissioner to deliver the securities held by him, including this note and mortgage, to the receiver,—which was done. The court by its order retained full control of the said securities.

It seems clear that the judgment for the defendant upon

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the cross-complaint that the note and mortgage be surrendered by the receiver was erroneous. Even if it were true, as defendant testified, that the note was an accommodation, put up only to secure policy holders, it cannot be surrendered until the last of the policy holders for whom it was put up is shown to be satisfied in full. Neither the fact that the policies have been reinsured nor the fact that the receiver holds sufficient other funds to secure all outstanding policies can avoid this conclusion, because the court cannot know whether, upon the occurrence of a loss, these other securities or the re-insurance will still be available, and has no right to reduce the security of the policy holders in the least.

The receiver is required by the order of the court which appointed him to keep the securities, received from the Commissioner, and the proceeds thereof, in a separate fund, to be disposed of only upon order of court. We must presume that that court will administer that fund properly, and will administer it for the benefit of the policy holders, if necessary and proper. The receiver is, therefore, bringing this suit, it would seem, as much for the benefit of the policy holders as for creditors or anybody else, and so we cannot see how the facts shown by the evidence are any defense against a suit by him. It may be that, if the proceeds of this note ultimately prove not to be required to satisfy the policy holders, they should be returned by the receiver to the maker. That is not a matter, however, for consideration in this case.

The note being in the hands of the receiver for the benefit of such persons as the court in charge of the receiver shall determine, he, as a faithful trustee, must sue, for several reasons, among others to escape the statute of limitations. Under such circumstances it is manifestly immaterial whether the note was an accommodation or an unqualified liability.

The plaintiff in error rests his case principally upon the ground that the evidence was insufficient to show that the note was an accommodation: in view of what we have

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said above, however, the question whether the note was an accommodation may have to be determined, ultimately, by the court in charge of the receiver; so here we will only say that the sufficiency of the evidence is doubtful.

The point is made that the commissioner had not power to transfer the note to the receiver and the latter has no power to sue on it, but the transfer is shown to have been made by order of the court, which, under some circumstances at least, has power to make such order, R. S. 1908, § 3099, and, since that order is not before us for review, we must presume that it was lawful.

The judgment should be reversed with directions to enter judgment and decree of foreclosure for plaintiff.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE SCOTT concur.

No. 9760.

CAMERON BROTHERS v. OSBORNE AS ADMINISTRATRIX.

Decided June 7, 1920. Rehearing denied October 9, 1920.

Action by administratrix, on a contract for rental of sheep, made by defendants with her intestate. Judgment for plaintiff.

Affirmed.

1. PLEADING—*Answer.* Where the allegations of the complaint are denied, but the same matters are expressly admitted or alleged in a second defense, no issue is raised.

2. CONTRACT—*Construed.* Where in a rental contract concerning sheep, the renters definitely, unconditionally and unqualifiedly agree to deliver to the owner a specified number of ewes at the end of the term, the fact that a number or all the ewes furnished by the owner perished through no fault of the renters, does not absolve them from their contract. This is true whether the transaction be considered a bailment or not.

3. VERDICT—*Judgment non obstante veredicto.* The defense in this

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case being insufficient in law, a verdict for defendants based thereon, is upon immaterial issues and a judgment *non obstante veredicto* is proper.

Error to the District Court of Bent County, Hon. A. C. McChesney, Judge.

Mr. H. L. LUBERS, Mr. FRANK EXLINE, for plaintiffs in error.

Mr. CARLE WHITEHEAD, Mr. ALBERT L. VOGL, Mr. BERNARD J. SEEMAN, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

The defendant in error was plaintiff below. She brought the action upon a contract made by the defendants with her intestate. The verdict was for the defendants, but the court rendered a judgment for the plaintiff *non obstante veredicto,* for the sum of $8,479.00.

By the contract, which was dated August 31st, 1912, the defendants "rented" from D. J. Osborne, plaintiff's intestate, 4,000 breeding ewes for five years, agreeing to pay for their use "an annual rental" in kind out of their increase: "It being understood that we will maintain said herd in a fine wooled strain of breeding during the entire term, and at the end of the term will deliver to you ewes of the full number of the contract, or quality in no wise inferior to those delivered to us, and of approximately equal ages to ewes now to be received by us."

Defendants kept the sheep for more than a year and paid one year's rent. The breaches alleged were failure to pay rent, failure to deliver part of the sheep and that those returned were greatly inferior and of much less value than those delivered.

The answer admits those allegations of the complaint which are essential to a cause of action. It seems to deny failure to pay rent, failure to deliver the lost sheep and depreciation of the survivors, but all these are *expressly*

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admitted or alleged in the second defense, so the denials raise no issue.

The second defense is an attempted confession and avoidance, to the following effect: That the defendants performed the contract until about December 4th, 1913; that on that day a storm of unprecedented violence destroyed 1500 of the sheep, and so weakened the remainder, "that it was impossible and impracticable in the circumstances to breed the surviving ewes of said sheep so that they might bear a lamb crop during the year 1914 and made it impossible for the defendants * * * to perform the contract as to the payment of rental and maintaining the herd * * * to the number of 4,000 ewes or the equivalent thereof as mentioned in said contract or to any greater number than 2,507 ewes which these defendants delivered back and returned on and in December, 1913, mentioned in the complaint in this behalf," and that their treatment of the sheep was with more than ordinary care.

The reply to this defense consisted of denials only. All other defenses were abandoned.

The only issues before the jury, then, arose out of the second defense. If those issues were immaterial the judgment *non obstante* was right. The question then is: Was this second defense sufficient in law?

The defendants contend that the transaction was one of bailment for the benefit of both parties, that therefore the defendants were bound only to ordinary care, that they gave that and more and so are not liable.

The plaintiff's proposition is, among others, that even if the transaction was a bailment, the defendants, by the clause in the contract above quoted, assumed the absolute responsibility for the return of 4,000 ewes in no wise inferior to those delivered.

We think the plaintiff's proposition is manifestly right. The defendants definitely, unconditionally and unqualifiedly agreed to deliver to the plaintiff at the end of the term 4,000 ewes. The fact that part or all of the ewes delivered

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to them perished through no fault of theirs is immaterial. It does not absolve them from their contract.

Jones v. U. S., 96 U. S. 24, 29, 24 L. Ed. 644; *Day v. U. S.*, 245 U. S. 159, 161, 38 Sup. Ct. 57, 62 L. Ed. 219; *Anderson v. May*, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642; *Ward v. H. R. Bldg. Co.*, 125 N. Y. 230, 26 N. E. 256; *School Dist v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371.

Such a contract is no more abrogated by misfortunes of the promissor than a promissory note would be or a promise to deliver 100,000 bushels of wheat or 1,000 head of cattle. *Bigler v. Hall*, 54 N. Y., 167. If the contract was a bailment, the parties, as they lawfully might, modified the ordinary implied liability of the bailee.

Pope v. Farmers' Un. Co., 130 Calif., 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87; *Drake v. White*, 117 Mass. 10.

The authorities differ as to whether an express contract to re-deliver a bailed chattel is avoided by inevitable accident, but here there is no such contract. The promise here is to deliver ewes of equal quality and age, to keep it, plaintiffs in error must, before delivery, dispose of practically all of the original stock. These provisions create liabilities different from the ordinary liabilities of a bailee.

Whether, then, the transaction was a bailment or not the terms of the contract are clear and it is the duty of the court to enforce them.

The second defense is insufficient in law, the verdict therefore was upon immaterial issues and the judgment *non obstante* is right. It is also true that a verdict for the plaintiff should have been directed for the above reasons and for others. The amount of the judgment was the least amount for which, under defendants' own evidence, any verdict could have been rendered; we think, therefore, that it was proper for the court to render judgment for that sum.

The judgment should be affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE ALLEN concur.

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No. 9490.

THE DENVER & RIO GRANDE RAILROAD CO. v. HOPKINS.

Decided October 4, 1920.

Action against a railroad company for killing stock. Judgment for plaintiff.

Affirmed.

1. RAILROADS—*Stock Killing—Negligence.* Under sec. 4, ch. 135, S. L. 1911, concerning the killing of stock by railroads, the killing or injury of an animal by a railway company is prima facie evidence of negligence on the part of the company. When the killing is admitted, the burden is upon the company to disprove negligence, and if it fails in this regard, it is liable for common law negligence, regardless of any question as to fences or yard limits.

Error to the District Court of Garfield County, Hon. John T. Shumate, Judge.

Mr. E. N. CLARK, Mr. G. A. LUXFORD, for plaintiff in error.

Mr. JOHN L. NOONAN and Mr. W. F. NOONAN, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

This was an action to recover the value of four head of cattle killed by the defendant's trains; three on November 7th, 1915, and one, a heifer, on November 24th, 1915. Judgment for plaintiff and the company brings error.

The complaint consists of two counts on the death of the three killed November 7th, one count for negligence at common law and the other for failure to fence under the statute of 1911, (S. L. 1911, p. 400,) and two similar counts in regard to the heifer killed November 24th.

As to the heifer: the only ground urged for reversal is that she was killed within the yard limits of a station, a

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place not required by the act of 1911 to be fenced, and that no other negligence causing her death was shown. Section 4 of the act in question, Session Laws 1911, p. 402, provides that the killing or injury of an animal by a railway company "shall be prima facie evidence of the negligence of said railway company." It is not disputed that the heifer was killed by the company. The burden was upon the company, then, to disprove negligence. *C. R. I. P. R. Co. v. Eyster*, 69 Colo. 168, 169 Pac. 1181. They offered no evidence on that point. The company, therefore, is liable for common law negligence, regardless of any question as to fences or yard limits.

With reference to the other three cattle, the case for the plaintiff is stronger, because they were killed at a place where a fence was required, but there was no fence.

The plaintiff in error cites many Colorado cases to the effect that negligence must be proved by the plaintiff, but these all seem to have been decided before May 30th, 1911, which is the day the act in question took effect.

The judgment must be affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE SCOTT concur.

No. 9856.

TAMARKIN v. THE DENVER TRAMWAY CO.

Decided October 4, 1920.

Action against a street railway corporation. Judgment of nonsuit.

Reversed.

1. TRIAL—*Nonsuit.* It is error to grant a nonsuit where there is sufficient evidence to require the submission of the case to the jury.

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Error to the District Court of the City and County of Denver, Hon. Greeley W. Whitford, Judge.

Miss CLARA RUTH MOZZER, Mr. PHILIP HORNBEIN, for plaintiff in error.

Mr. GERALD HUGHES, Mr. HOWARD S. ROBERTSON, for defendant in error.

Department One.

MR. JUSTICE BURKE delivered the opinion of the court.

DEFENDANT operates a street railway system in the city of Denver. On or about June 22, 1919, Jacob Tamarkin was struck by one of its cars and killed. This action was brought by plaintiff in error, widow of deceased, for damages. At the close of plaintiff's evidence defendant moved for nonsuit, which motion was sustained, and such further proceedings had that the cause comes to this court on error, and is now before us on plaintiff's application for supersedeas.

Burke, J., after stating the case as above.

The sole question here involved is whether plaintiff's evidence was sufficient to require a submission of the cause to a jury. We have examined the entire evidence with great care, and are of the opinion that it was. We think no good purpose could be served by a detailed discussion of the circumstances. The judgment is accordingly reversed, and the cause remanded.

MR. JUSTICE TELLER and MR. JUSTICE DENISON concur.

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No. 9608.

REMINGTON *v.* REMINGTON AS EXECUTOR, ET AL.

Decided October 4, 1920.

Action for the determination of the respective rights of a widow and the heirs of her husband by a former marriage. Judgment for the heirs.

Affirmed.

1. HUSBAND AND WIFE—*Contract Concerning Property Rights.* An oral contract was entered into between a husband and wife before their marriage wherein it was agreed that their property rights should not be affected by the marriage. Subsequent to their marriage they executed a written agreement in which each waived and released all right to the property of the other. The husband left a will in which no provision was made for the widow and she attempted to repudiate the contract, claiming one-half of his estate under the statute for the alleged reasons that the oral contract was void within the statute of frauds and that the written agreement was ineffectual for want of consideration. Both contentions are resolved against the widow, the court holding that her violation of the solemn contract was a manifestation of bad faith and ought not to be tolerated.

Error to the District Court of Larimer County, Hon. Robert G. Strong, Judge.

Mr. CORYDON ROOD, Mr. R. W. FLEMING, for plaintiff in error.

Mr. AB. H. ROMANS, Mr. PAUL W. LEE, Mr. GEORGE H. SHAW, for defendants in error.

MR. JUSTICE TELLER delivered the opinion of the court.

THE parties to this cause submitted to the district court an agreed statement of facts upon which they asked for a determination of their respective rights. The court found for the defendants in error. Plaintiff in error brings the cause here for review.

The plaintiff in error and one D. D. Remington, now de-

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ceased, became husband and wife at a time when each had children by former marriages, and property in their respective rights. Some months after marrying, they entered into a written contract, the important parts of which are as follows:

"WHEREAS, each of said parties had in his or her own right certain real and personal property at the time of said marriage and were also the father and mother, respectively, of children by former marriages, and,

WHEREAS, before their marriage with each other, and in consideration thereof, each of the said parties agreed with the other that none of their respective property rights should in any way become affected or changed by reason of said marriage.

NOW, THEREFORE, in consideration of the foregoing premises, and of the mutual covenants herein contained, the party of the first part hereby waives, releases, foregoes and disclaims all his rights in any and all property, both real, personal and mixed, wheresoever situate, of which the party of the second part, is or may become seized or possessed, and hereby expressly waives all right to inherit from said second party under the laws of any and all states of the United States, and hereby agrees that the party of the second part shall have the right to dispose of all of her property by will and in case the party of the second part fails to dispose of any of her property, of any kind, by will, then said property shall descend to her legal heirs, other than the party of the first part, and he shall not inherit anything from her."

There was a similar covenant upon the part of the wife waiving claim upon the property of the husband.

The husband left a will in which, in accordance with the said agreement, no provision was made for his widow; and she now repudiates the contract, and claims one-half of the estate under the statute.

It is contended by the plaintiff in error that the contract made before marriage, to which reference is made in the written instrument, was void within the statute of frauds

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because it was oral; it being her contention that it is a promise in consideration of marriage. She contends that the written contract is ineffectual for want of consideration. We do not agree with either of these positions.

It is true that in the recital it is stated that the parties, in consideration of marriage, made the agreement; but the agreement itself shows that it was not so made. Contracts in consideration of marriage provide for the moving of some benefit to one of the parties as an inducement for marrying. There is no such case here presented. The facts show that these parties were arranging to preserve to themselves respectively the right to dispose of the property held before marriage, and to protect their respective heirs, or the beneficiaries under their wills, in their property rights, as against any claim which might arise because of the marriage relation. The words "in consideration thereof" are not to be construed as indicating that either party was induced to marry the other by reason of these covenants. Indeed the covenants conflict with such an idea. The parties were agreeing that they would secure nothing from each other through the marriage relation. It is clear that the words "in consideration thereof" were used to show a situation which would have been properly described by saying that the parties had made the oral agreement in contemplation of marriage.

Furthermore, it is wholly immaterial, in the view we take of this question, what was the agreement made before marriage. The contract in question, reduced to writing and signed by the parties, is made upon a consideration of mutual promises, and in it each releases to the other all right in or control over the other's property; and likewise waives all right to claim the same under any law of descent. Whatever may be the rule in those states having special statutes limiting the rights of parties during coverture, or in states following the common law, there is no reason why in this state, where woman has been relieved of her disabilities and specifically authorized to contract with any and every one,

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she cannot make a binding contract during coverture, provided it is free from taint of fraud or duress.

The tendency of the cases seems to be, even where the disabilities of coverture have been removed by law, to adhere more or less to the old construction as to a woman's rights to contract with her husband.

In the case of *Unger v. Mellinger*, 37 Ind. App. 639, 77 N. E. 814, 117 Am. St. Rep. 348, the court says that the promise upon the part of the husband and wife each to forego any claim upon the property of the other does not constitute a consideration for a postnuptial contract. Plaintiff in error relies upon this case as holding to that effect. What the court says, however, is merely dictum, because it states that there is no evidence that the contract was made in consideration of mutual releases. It is admitted, even in a state still adhering to the common law, that an antenuptial contract containing mutual covenants waiving and releasing the rights of each party in the property of the other, is good. *Kroell v. Kroell*, 219 Ill. 105, 76 N. E. 63, 4 Ann. Cas. 801. Why then is it not good in a state where the wife's disabilities are removed, and she is as free to contract as when sole?

In this case it appears that the widow seeks to have the district court, in construing her husband's will, sanction her admitted violation of a solemn contract with her husband, now deceased. She is now at liberty to dispose of her property which was involved in the agreement without the possibility of loss by this breach of contract on her part. This is grossly inequitable, a manifestation of bad faith, and ought not to be tolerated.

The district court was right in its judgment and the judgment is accordingly affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BURKE concur.

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No. 9645.

FLORA v. GLOVER.

Decided October 4, 1920.

Action for specific performance. Judgment for plaintiff.

Affirmed.

1. TENDER—*When not Necessary.* A formal and technical tender of money is not necessary when the actions of the party to whom it is to be made show that it would not be accepted.

2. EQUITY—*Specific Performance of Contracts.* Conceding a breach of the contract, a court of equity may grant relief when such relief appears to be in accord with the intent of the parties when the contract was made.

3. CONTRACT—*Breach by Failure to Pay on a Day Stipulated.* Failure to pay on a day stipulated in the contract, is not a fatal breach unless time is of the essence of the contract.

4. *Time the Essence.* The intent to make time of the essence of a contract must be clearly and unmistakably shown.

Error to the District Court of Sedgwick County, Hon. L. C. Stephenson, Judge.

Messrs. MUNSON & MUNSON, for plaintiff in error.

Messrs. ROLFSON & HENDRICKS, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error was plaintiff in a suit to enforce the specific performance of a contract by which the plaintiff in error covenanted to convey to Glover a tract of land upon the payment of a stipulated sum. The parties will be designated as in the court below.

It appears from the record that the plaintiff, being desirous of purchasing the property in question, and not at the time having the funds therefor, induced the defendant to make the purchase, on an agreement to convey to the plaintiff when he had paid for it. The contract in suit was the result of that transaction.

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The contract provided that final payment should be made November 1, 1918, and that in case of a failure of the vendee to make such payment, the vendor might, at his option, forfeit said contract. Payment was not made on the day stipulated. Some two weeks later the defendant mailed to the plaintiff a letter declaring the contract forfeited, and demanding possession of the property, and payment of rent for the time the same had been occupied by the plaintiff. It does not appear that plaintiff received said letter. Immediately thereafter, the plaintiff called on defendant and told him that he had the money, and desired to make final payment on the property. Defendant replied that he would not accept the money, he having forfeited the contract, as provided by its terms.

The trial court found that time was not of the essence of the contract, and entered judgment in favor of the plaintiff. The case is now before us on error.

Counsel for defendant urge that in the absence of a valid tender of the amount due, the plaintiff cannot recover. It appears, however, that the action of the defendant, when approached on this subject by the plaintiff, was such as to make a formal and technical tender of the money unnecessary.

It is further urged that the court, in granting specific performance after breach of the contract and the forfeiture declared, in effect makes a new contract for the parties. Such is not the case. The principle upon which courts of equity direct specific performance of contracts which have not been fulfilled according to their strict terms, is that, conceding a breach of the contract, a court of equity may grant relief, when such relief appears to be in accord with the intent of the parties when the contract was made.

The breach in this case is in failure to pay on the day stipulated. This breach is not fatal to the plaintiff's rights unless time is of the essence of the contract. There is no stipulation to that effect, and the circumstances surrounding the making of the contract, as shown in evidence, do not suggest that the time of payment was considered material

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by the parties. That being so, it will not be considered material in a case of this kind. In *Byers v. Denver C. R. Co.*, 13 Colo. at page 556, (22 Pac. 953) this court said:

"It is a well settled rule in equity that time is not of the essence of the contract to convey lands, unless made so by direct contract of the parties or necessary implication."

In *Hoagland v. Murray*, 53 Colo. 50, 123 Pac. 664, this court quoted with approval the case above cited. This is the general rule:

"The intent to make time of the essence must be clearly and unmistakably shown. An intention to make time essential cannot be inferred from the mere appointment of a day for the delivery of a deed, or the payment of the price." 36 Cyc. 713.

The trial court did not err in holding that the plaintiff had a right to a specific performance of the contract upon the part of the defendant, on the payment of the balance of the purchase price. The judgment is therefore affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BURKE concur.

No. 9677.

THE DENVER & RIO GRANDE RAILROAD CO. *v.* BOARD OF COUNTY COMMISSIONERS OF ALAMOSA COUNTY, ET AL.

Decided October 4, 1920.

Action to enjoin the collection of taxes. Judgment of dismissal.

Affirmed.

1. TAXATION—*Illegal Levy—Action.* The mere fact of a levy of an illegal or void tax does not entitle the taxpayer to enjoin its collection, and a court of equity will not entertain jurisdiction for that purpose unless there exists also some recognized equitable ground for the granting of relief.

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2. *Illegal Levy—Appropriate Action.* Sec. 5750, R. S. 1908 affords an adequate remedy in case of an illegal or erroneous levy.

Error to the District Court of Alamosa County, Hon. Jesse C. Wiley, Judge.

Mr. E. N. CLARK, Mr. G. A. LUXFORD, for plaintiff in error.

Mr. ALBERT L. MOSES, for defendants in error.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiff in error brought suit against the defendants in error to enjoin the collection of a tax, upon what is alleged to be an excessive levy. The complaint sets up that the levy of the tax constituted a mistake amounting to fraud, which would result in the fraudulent taking of plaintiff's property; that the collection of the tax would deprive plaintiff of its property without due process of law; that the plaintiff would be irreparably injured, and that it had no adequate remedy at law. Defendants filed an answer containing a general demurrer, and alleging that the plaintiff had a full, adequate and complete remedy in the ordinary course of law. The court adopted the view of defendants in the matter above stated, and dismissed the action. The cause is now here on error. This court has several times held that the mere fact of a levy of an illegal or void tax does not entitle a taxpayer to enjoin its collection; that a court of equity will not entertain jurisdiction for that purpose unless there exists also some recognized equitable ground for the granting of relief. The cases are collected in *Nile District v. English*, 60 Colo. 406, 410, 193 Pac. 555. It has been several times pointed out in these cases that Section 5750 R. S., 1908, affords an adequate remedy in case of an illegal or erroneous levy. The other allegations, intended to show grounds for the exercise of jurisdiction, are mere conclusions of the pleader, and wholly insufficient for the purpose mentioned. This cause

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presents no features which render it an exception to the rule so often applied.

The trial court did not err in dismissing the cause and the judgment is accordingly affirmed.

CHIEF JUSTICE GARRIGUES and MR. JUSTICE BURKE concur.

No. 9920.

HORNE, ET AL. v. REDMAN, ET AL.

Decided October 4, 1920.

Action involving motion for continuance which was overruled by the court below.

Affirmed.

On Application for Supersedeas.

1. APPEAL AND ERROR—*Affidavits—Bill of Exceptions.* Affidavits to be considered by the appellate tribunal must be brought before the court by bill of exceptions.

Error to the District Court of The City and County of Denver, Hon. Julian H. Moore, Judge.

Messrs. SYMES & WINGREN, for plaintiffs in error.

Mr. T. J. O'DONNELL, Mr. J. W. GRAHAM, for defendants in error.

MR. JUSTICE TELLER delivered the opinion of the court.

THIS cause is before us on an application for a supersedeas. The principal error alleged is in the court's overruling a motion by plaintiffs in error for a continuance. The defendants in error now move to strike from the transcript of record certain affidavits filed in support of the motion for a continuance, upon the ground that they are improperly included in the record; and, further, that the

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court cannot consider them, they not having been brought into the record by bill of exceptions.

Plaintiffs in error contend that under Section 3 of Chapter 6 of the Session Laws of 1911, these affidavits are a part of the record, being, as they say, by reference incorporated into and made a part of the motion for a continuance, which, under said section is a part of the record. They cite several cases from other states in which affidavits attached to the motion for a new trial have been held a part of the record proper. In those cases it appears, however, that the affidavits either form a part of the motion by being all upon one paper, or were recognized by the court in its rulings as having been before it. The statute in question makes motions for a continuance a part of the record, but does not change the established rule that affidavits, to be considered by this court, must be brought before the court by bill of exceptions.

In *Interstate Land & Town Co. v. Patton,* 21 Colo. 503, 42 Pac. 673, this court ruled specifically that in order to obtain a review of the trial court's ruling upon an application for a continuance the affidavits in support of the motion must be brought into the record by a bill of exceptions. At the time that case was decided, Section 387 of Mills' Annotated Code, which is identical with the section cited from the laws of 1911, was in force.

In *Phoenix Indemnity Co. v. Greger,* 39 Colo. 193, speaking of affidavits filed in support of a motion for change of venue, we said: "Copying these documents in the court journals, and authenticating them as entered in the clerk's minutes, do not make them parts of the record. This method cannot take the place of a bill of exceptions or operate as a substitute therefor."—Citing a number of cases.

We have, however, examined the affidavits and are of the opinion that the court did not abuse its discretion in refusing the application based upon them. They do not set out the facts required in such cases to entitle the applicant to a continuance.

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The supersedeas is denied and the judgment affirmed.

MR. JUSTICE BURKE and MR. JUSTICE DENISON concur.

No. 9643.

LANE v. GOODING, ET AL.

Decided November 8, 1920.

Action for attorney fees. Judgment for plaintiffs.

Affirmed.

1. ATTORNEY AND CLIENT—*Contract.* Where attorney and client enter into a contract providing for the payment of attorney fees, the client will be at least liable on *quantum meruit*, if not on the agreement, where he puts it out of the power of the attorney to complete the contract.

2. CONTRACT—*Construction.* Where a contract between attorney and client is for legal services pertaining to a *cause of action*, the contract does not limit the services to a trial in the district court, but extends to such as are necessary for securing redress for a violation of the client's rights.

Error to the District Court of Routt County, Hon. John T. Shumate, Judge.

Mr. ALBERT G. CRAIG, for plaintiff in error.

Mr. A. M. GOODING, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

GOODING and Wessels were plaintiffs below and had a verdict and judgment for $1,000.00 upon a *quantum meruit*, for services as attorneys. They entered into a written contract with Lane, defendant below, "to perform all legal services incident or pertaining to a certain cause of action

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wherein John W. Lane is plaintiff and Elbert J. Lyon is defendant, pending in the District Court of Morgan County," for a contingent fee of $2,000.00 payable in land. The suit of *Lane v. Lyon* was transferred to Routt County, Lane was there defeated, a writ of error was sued out of this court pending which Lane employed other counsel, and, without notice to Gooding and Wessels, settled with Lyon. The present suit was brought by Gooding and Wessels upon the contract but the complaint contained a count in *quantum meruit* upon which the verdict and judgment were rendered.

Since Lane put it out of his attorney's power to complete the contract, he was at least liable on *quantum meruit*, if not upon the contract.

It is claimed that the contract referred only to the action in the district court, but we do not think that is a reasonable construction of it. The contract refers to "cause of action" not suit or action; therefore the attorneys were employed not merely to complete the proceedings which constituted the *action* in the district court but to secure for their client redress for the violation of some right which right and violation constituted his "*cause* of action." The parties evidently so understood it, because the attorneys without further contract took the matter to this court, and Lane requested them to advance and repaid to them costs for that purpose; furthermore we think a contract for a contingent fee to cover services in the lower court merely would be rather unusual.

The above considerations make it unnecessary to notice the question whether, in view of the contract, Lane had power to abandon his suit against Lyon without the consent of his attorneys, and several other questions which are noticed in the briefs.

The judgment is affirmed.

MR. JUSTICE SCOTT and MR. JUSTICE BAILEY, not participating.

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No. 9829.

THE MIDGET CONSOLIDATED GOLD MINING CO. ET AL. v. THE INDUSTRIAL COMMISSION, ET AL.

Decided November 8, 1920.

Action in the district court to review an award of the Industrial Commission. Award affirmed.

Reversed.

1. WORKMEN'S COMPENSATION—*Industrial Commission—Practice.* A suit cannot be maintained in the district court to review the action of the Industrial Commission, where the plaintiff has failed to petition the commission for a review under the provisions of secs. 97 and 98, chap. 210, S. L. 1919.

2. EVIDENCE—*Presumptions.* Parties are presumed to know the law and neglect, discourtesy or inefficiency on the part of the Industrial Commission, if there be such, cannot relieve them of this presumption nor from the necessity of complying with the statute.

3. WORKMEN'S COMPENSATION—*Procedure.* Where it appears on the trial of a cause brought in the district court to review an award of the Industrial Commission, that no petition for a review was filed with the commission before bringing the action, the proper procedure is to dismiss the suit.

4. APPEAL AND ERROR. Questions not involved in the matter before the *nisi prius* court will not be considered on review of an Industrial Commission case here.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. BOSWELL F. REED, Mr. ROBERT W. STEELE, JR., for plaintiffs in error.

Mr. VICTOR E. KEYES, Attorney General, Mr. JOHN S. FINE, Assistant, Mr. H. E. CURRAN, for defendants in error.

Department Two.

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MR. JUSTICE DENISON delivered the opinion of the court.

THIS case is brought here on error to the district court of Denver, which upon a writ of review to The Industrial Commission affirmed the commission's award.

Mariellan Mishey instituted proceedings before the Industrial Commission to get compensation from plaintiffs in error for the death of her husband, Calvin H. Mishey, and on October 8, 1919, was awarded $2500.

One Doepke was acting in the matter for the plaintiffs in error. On October 9th, at Cripple Creek, he received notice of the award and under date of October 10 wrote to the commission at Denver asking "the number of days which the law permits me to file an appeal." The commission appears not to have received this till October 16th. They replied October 21st, enclosing blanks for a petition for review, saying: "Petition for review should be filed within ten days from the date of the referee's award."

The court held that their suit could not be maintained because the petition for review was not filed within the ten days provided by statute. In this the court was right, following §§ 97, 98, Chap. 210 Laws of 1919 and *Passini v. Ind. Com.*, 64 Colo. 349, 171 Pac. 369, and *Stacks v. Ind. Com.*, 65 Colo. 20, 170 Pac. 588, which hold that without an application to the Commission for review no case can be reviewed by the district court.

Doepke and the other plaintiffs in error are presumed to know the law. They could actually have known it within a few hours without writing to Denver. Neglect, discourtesy or inefficiency on the part of the commission, if there was such, cannot relieve them from this presumption nor from the necessity of compliance with the statute.

The court, however, affirmed the award of the commission. We think it should have dismissed the suit. Section 98 above cited provides:

"No action, proceeding or suit to set aside, vacate or amend any finding, order or award of the commission or referee * * * shall be brought unless the plaintiff shall

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have first applied to the commission for a review as herein provided."

No application for review having been made to the commission within ten days prescribed by § 97, the suit in the district court was unlawfully brought and we think the district court rightly so decided and in consequence thereof that court could do nothing then but send the plaintiffs out of court.

It is strongly urged that we ought to determine the question whether the commission had jurisdiction because the claim is made that under the circumstances of this case the parties were not within the terms of the Workmen's Compensation Act, that consequently the Industrial Commission had no jurisdiction over the matter and that therefore we should set aside the action of the commission as void.

This argument is unsound. The question before us is whether the judgment of the district court was right. It follows from what has been said above that neither the question of the jurisdiction of the commission nor any other question was before the court below, and if not before that court then not before this court.

We think the case should be remanded with directions to dismiss the case without affirmance, thus leaving the award standing.

Reversed and remanded with directions.

MR. JUSTICE BAILEY and MR. JUSTICE TELLER concur.

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No. 9867.

THE MOGOTE-NORTHEASTERN CONSOLIDATED DITCH CO. v. GALLEGOS.

Decided November 8, 1920.

On motion to strike bill of exceptions.

Motion denied.

1. PRACTICE—*Oral Stipulations.* An oral stipulation cannot be enforced in case a dispute arises between the parties as to its terms.

2. APPEAL AND ERROR—*Bill of Exceptions—Waiver.* Whenever an attorney approves a bill of exceptions and permits it to be allowed without making the objection that it is too late, he will be regarded as waiving that objection and consenting to the allowance.

Mr. RALPH L. CARR, for plaintiff in error.

Mr. JAMES P. VEERKAMP, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THE defendant in error moves to strike out the bill of exceptions because it was not presented to the court below within the time allowed by that court.

It appears by affidavits filed in this court that the attorneys for the respective parties had some conversations as to extension of time for presenting the bill of exceptions, but they do not agree as to what those conversations were.

We cannot try a question of veracity of attorneys as to their oral agreements made out of court nor correct their misunderstandings. If they trust to such uncertainties and do not take the prescribed and certain methods of written stipulations or regular orders made upon notice or appearance, they must understand that each is relying solely on the other and that in case of dispute the stipulation cannot be enforced.

In this case, then, we must take the record as it stands

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before us.

The extended time expired June 5th, 1920, and on the 22nd of June the attorney for the plaintiff in error presented the bill of exceptions and transcript of record to the attorney for the defendant in error at Monte Vista, with the following notice:

"To James P. Veerkamp, Esq., Attorney for the plaintiff above named:—I hereby submit to you for approval or correction the record and bill of exceptions in the above entitled cause. Ralph L. Carr,
Attorney for Defendant."

Upon the face of this notice is the following memorandum, in the handwriting of the attorney for the plaintiff below:

"This Record and Bill of Exceptions correctly states the proceedings in the trial of this case 6/22—1920.
James P. Veerkamp,
Attorney for Plaintiff."

The attorney for the defendant took the record and bill of exceptions bearing this notice and memorandum to the Judge at Del Norte and the bill was thereupon approved.

If the plaintiff's attorney desired to object to the signing of the bill, he should have added to his memorandum the statement that he objected to the signing because it was too late, as in *Bell v. Murray,* 13 Colo. App. 217, or have gone before the court with his opponent and objected there. This case in all essentials is like the case of *E. I. Dupont &c. Co. v. Smith,* 249 Fed. 403, and differs very little from the case of *Hoover v. Shott,* 68 Colo. 385, 182 Pac. 883.

The court cannot, without consent, allow a bill of exceptions after both the 60 days mentioned in S. L. 1911, p. 10, and any extended time granted within said 60 days have expired. *Ransom v. Holland,* 66 Colo. 420, 182 Pac. 885; but we think that whenever an attorney approves a bill of exceptions and permits it to be allowed without making the objection that it is too late, he should be regarded as waiving that objection and consenting to the allowance. See *R. G. S. R. R. Co. v. C. F. & I. Co.,* 41 Colo. 3, 7-8. Such a rule is fair to all parties, tends to prevent disaster to liti-

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gants through fraud or misunderstanding and is the reasonable interpretation of the approval or the statement that the bill correctly states the proceedings. See *Rose v. Agricultural D. Co.*, decided at the present term.

The motion to strike the bill of exceptions should be denied. There is a suggestion of diminution but the denial of the motion to strike makes it unnecessary to consider it.

MR. JUSTICE TELLER, sitting for MR. JUSTICE SCOTT.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE TELLER concur.

No. 9872.

THE EMPLOYER'S MUTUAL INSURANCE CO., ET AL. *v.* MORGULSKI, ET AL.

Decided November 8, 1920.

Proceeding under the workmen's compensation act. Judgment for claimant.

Affirmed.

1. WORKMEN'S COMPENSATION—*Finding of Industrial Commission.* The appellate court will not reverse a finding of the Industrial Commission on the weight of the evidence, in reviewing a judgment of the district court.

2. *Marriage.* Evidence concerning marriage of claimant and deceased employe reviewed and held to establish the claim that they were husband and wife.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. FRANK C. WEST, Mr. H. A. HICKS, for plaintiff in error.

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Mr. C. M. MCCUTCHEN, Mr. VICTOR E. KEYES, attorney general, Mr. JOHN S. FINE, assistant, for defendants in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THERE seem to be two questions which arise upon this record:

1. Was Lillian A. Morgulski the wife of Joe Morgulski, whose death benefit she claims?

2. If she was, was she dependent on him for support?

She testifies and it is undisputed that he desired to marry her and she him. She further testifies that her father objected while her mother approved. They became engaged and on July 4th, 1918, they agreed that they would live together as man and wife and would marry by ceremony as soon as they could get the father's consent, which they hoped to obtain since his only objection was her youth. Pursuant to this agreement they told her mother that they were married and proceeded to have intercourse, occupying, at various times, the same room in the house of her father and mother, without the knowledge of the father but with the knowledge of the mother, keeping their so-called marriage secret because of the father's objections.

It is impossible to determine from the testimony whether the deceased lived at the father's house or merely visited the claimant there at night. Her testimony and that of her mother is consistent with the claim that he merely visited her there, occupying the same room with her, but not taking his meals there, and not contributing to the support of the family, except a few dollars, which were by her given to her mother. It is also consistent (except, perhaps for the alleged fact that their relations were secret from the father) with the theory that he remained there weeks and perhaps months at a time, practically as a member of the family.

Morgulski told one of his employers that he was married to the claimant. He also when entering the employment

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of the Oakdale Company, August 12th, 1918, signed an application which stated that he was married and that his wife's name was Lillian Morgulski, and gave her name at the address of her mother as the person to whom information should be given in case of accident to him. The mother testified that her daughter and Morgulski told her that they were married but wished to keep it secret from the father.

We cannot reverse the finding of the commission on the weight of evidence and therefore do not review it further.

The plaintiffs in error, however, insist that a mere contract of marriage, that is, an agreement to be then, there and thenceforth man and wife, does not constitute marriage without cohabitation, and that such cohabitation must be not merely sexual intercourse on visits of more or less length yet temporary, but actual dwelling together in the usual manner of married people, dwelling, as one court has expressed it, "with the habit and repute of marriage;" that in the present case there was no such cohabitation and therefore the claimant was not the wife of the deceased.

The flaw in this reasoning is in the minor premise. The evidence does not wholly fail to show a cohabitation as of marriage, though it is most unsatisfactory so far as the testimony and conduct of the claimant and her mother are concerned, but the added documentary evidence that deceased regarded claimant as his wife and directed information to her in case of accident to him must be regarded as giving character to such cohabitation as they had; and therefore, though the company's claim as to the kind of cohabitation, requisite in such a case to constitute marriage, be correct, we cannot say that the finding of the commission was unjustified.

This case must be distinguished from those where the sole or principal evidence of the contract of marriage is cohabitation, and from those where such contract is denied by one of the parties thereto, as *Peery v. Peery*, 27 Colo. App. 533, 150 Pac. 329, and from those in which the testimony of one of the parties to the contract is the only direct evidence thereof.

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As to the support, there is, we think, sufficient evidence that she was dependent on him so that the finding must stand.

Judgment should be affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BAILEY sitting for MR. JUSTICE SCOTT, concur.

No. 9876.

DAVIS v. PATTERSON.

Decided November 8, 1920.

Action for conversion of personal property. Judgment for plaintiff.

Reversed.

On Application for Supersedeas.

1. PERSONAL PROPERTY—*Possession—Issue.* In an action between two purchasers of the same personalty, the issue is not whether plaintiff or defendant acquired possession first; but whether, at the time defendant took possession of the property, plaintiff was in actual, continued, visible, open, unequivocal and exclusive possession thereof.

2. *Action for Conversion—Burden of Proof.* Defendant is entitled to a verdict if the evidence is evenly balanced.

3. *Sale—Possession—Knowledge or Information to Put on Inquiry.* The question of knowledge or information to put on quiry, under sec. 2668, R. S. 1908 concerning the sale of goods and chattels, is immaterial in an action to determine the right to personal property.

Error to the District Court of Logan County, Hon. L. C. Stephenson, Judge.

Messrs. MUNSON & MUNSON, for plaintiff in error.

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Messrs. COEN & SAUTER, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

Patterson brought suit against Davis for the conversion of certain corn. He recovered judgment and the defendant brings error and applies for a supersedeas.

One B. S. Monday leased land to one Doremus for the crop season of 1918, the lease to terminate March 1st, 1919. Doremus was to pay the landlord one-third of the corn and two-thirds thereof belonged to him. November 4th, 1918, Doremus gave Monday a bill of sale of his two-thirds of the corn. December 3rd, 1918, Monday assigned this bill of sale to plaintiff Patterson for a good and valuable consideration. November 16th, 1918, Doremus executed another bill of sale to Davis, the defendant, covering the same two-thirds interest, in payment of a debt of about $750. It is admitted that both Davis and Patterson acted in good faith.

Patterson did nothing to take possession until some time in January or early in February, 1919, when men employed by him shucked a portion of the corn and left it piled on the ground. The remainder stood in the field and he did nothing more. On or about February 16th the defendant husked two-thirds, sold it and received the money, leaving in the field the corn which Doremus pointed out as Patterson's or Monday's third of the crop. For the conversion of this two-thirds the suit was brought. The court, over the objection of the defendant, instructed the jury as follows:

* * * The question upon which this case turns is the question of whether the plaintiff or the defendant acquired possession of the property first; that is to say, did the plaintiff by starting in and husking a portion of the corn acquire possession of the whole amount purchased under his bill of sale, or did the defendant at a subsequent time acquire possession of the remaining portion of the corn. * * * the plaintiff can only recover when the evidence convinces you by a preponderance thereof that he has a

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right to recover. On the other hand, the defendant cannot recover unless the preponderance of the evidence is in his favor. If you believe from the evidence that in the matter of taking possession of the property the defendant had knowledge or sufficient information to put him on inquiry concerning the claim of the plaintiff to the property and his assumption of possession thereof, then the defendant cannot recover, and your verdict should be for the plaintiff.

We think this instruction is erroneous in three respects:

First, the question upon which the case turns is not whether plaintiff or defendant acquired possession of the property first. It is whether at the time defendant took possession of the two-thirds the plaintiff was in the actual, continued, visible, open, unequivocal and exclusive possession thereof. It is manifest that he was not, and therefore a verdict for the defendant should have been directed. R. S. 1908, § 2668; *Cook v. Mann*, 6 Colo. 21; *Bassinger v. Spangler*, 9 Colo. 175, 179, 10 Pac. 809; *Allen v. Steiger*, 17 Colo. 552, 31 Pac. 226; *Bartell v. Griffin*, 47 Colo. 569, 108 Pac. 171; *Lloyd v. Williams*, 6 Colo. App. 157, 40 Pac. 243; *Willis v. Roberts*, 18 Colo. App. 149, 70 Pac. 445.

Whatever possession Patterson may once have had it was not continued until the time that Davis took possession, and at that time no one was in actual possession. Patterson's possession, if it could be called possession, was not then visible, because no one was there. The corn was in the open field. It was equivocal, because it was consistent with a claim of one-third as well as more, and with possession by Doremus as well as Patterson. It was not exclusive because Doremus still had free access.

Second, the defendant was entitled to a verdict in case the evidence was evenly balanced. The instruction is that neither plaintiff nor defendant could have a verdict without a preponderance of evidence.

Third, knowledge or information to put on inquiry, under the statute in question, is immaterial. (see cases cited above.) In *Bassinger v. Spangler* the attaching creditors knew all about the assignment to Bassinger. This case is

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much plainer than that yet there the verdict was directed and the judgment was affirmed in this court.

The judgment should be reversed with directions to enter judgment for the defendant.

MR. JUSTICE TELLER, sitting for MR. JUSTICE SCOTT.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE TELLER concur.

No. 9877.

THE DUTTON HOTEL COMPANY, ET AL. *v.* FITZPATRICK.

Decided November 8, 1920.

Action by guest against a hotel corporation for conversion of baggage. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

1. LIMITATIONS—*Conversion—When Statute Begins to Run.* In a suit by a guest against a landlord for conversion of baggage, the action did not accrue until demand, the refusal of which constituted conversion, at which time the statute of limitations began to run.

2. STATUTE—*Application.* Sec. 6, c. 192, S. L. 1907, concerning the liability of hotel keepers for baggage left in their charge, applies to baggage left for safe keeping only, not to that in pledge.

3. CORPORATIONS—*Effect of Dissolution on Previous Liabilities.* The dissolution does not affect remedies against the corporation.

4. ACTIONS—*Lien on Chattels.* The remedy against the holder of a chattel under lien, is to tender satisfaction of the lien and demand possession. Upon refusal, which would amount to conversion, trover lies.

5. PLEDGE AND PLEDGEE—*Negligence—Burden of Proof.* Loss by a pledgee is *prima facie* proof of negligence, and the burden is upon him to rebut it.

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Error to the District Court of the City and County of Denver, Hon. John T. Shumate, Judge.

Mr. JOHN HORNE CHILES, for plaintiffs in error.

Mr. E. L. CLOVER, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THE Dutton Hotel Company, plaintiff in error and defendant below, was an innkeeper. The defendant in error, plaintiff below, a guest at its hotel in 1911, left owing a bill and the defendant retained her trunk as security for the same.

In 1915 the defendant corporation was dissolved under the statute. The individual defendants were officers, directors and the principal stockholders thereof.

In 1917 the defendant paid $50 on the bill and in 1918 she came to Denver from Nebraska and demanded the trunk but was told by defendant, Frank Dutton, that it could not be found, whereupon she brought suit for conversion and had judgment.

The defendants move for supersedeas. They make four points in argument and we shall notice no others.

1. That the action was barred by the statute of limitations.

2. That the verdict was excessive.

3. That the action cannot be maintained against a dissolved corporation.

4. That the action cannot be maintained without showing negligence on the part of the defendants, and that none is shown.

The action did not accrue until demand. *Austin v. Van Loon*, 36 Colo. 196, 85 Pac. 183. Until then the defendant was in lawful possession. The refusal constituted the conversion; therefore the limitation, six years, had not run when the suit was commenced. See also *Carper v. Risdon*, 19 Colo. App. 530, 76 Pac. 744.

As to the damages the evidence would have justified

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greater damages. The statute 1 Mills (1912) § 3447, S. L. 1907, p. 430, § 6, applies to baggage held for safe-keeping only, not to that in pledge.

The dissolution does not affect remedies against the corporation.

The dissolution for any cause whatever, of corporations created as aforesaid, shall not take away or impair any remedy given against such corporations, its stockholders, or officers, for any liabilities incurred previous to its dissolution. R. S. 1908 § 899, G. S. § 270; G. L. § 223.

The remedy against a holder of a chattel under a lien is to tender satisfaction of the lien and demand possession. Upon refusal, which would amount to conversion, trover lies. That was the case here.

The argument of defendant is that since the conversion did not take place till after the dissolution the corporation cannot be liable for it. The answer is that the tender and demand was the remedy which existed before and at the dissolution, and under the above section the plaintiff could pursue that remedy to its ultimate result, a judgment for conversion.

The corporation was holding by innkeeper's lien, or as pledgee. *Murray v. Marshall*, 9 Colo. 482, 485, 13 Pac. 589, 59 Am. Rep. 152. If the former it was bound to extraordinary care; if the latter to ordinary care; and, under the instructions, the jury must have found that it did not exercise such care. It is claimed that there was no evidence to justify such a finding, but it appears that a few months after plaintiff left its hotel defendant sold out its business, and, without notice to plaintiff, left the trunk in a baggage room without taking any receipt or memorandum from the purchaser or telling him the nature of the possession, or, according to his testimony, even telling him that the trunk was there and then made no inquiry for years. We could not say that the jury was not justified in its finding even if the burden were on plaintiff, but loss by a pledgee is *prima facie* evidence of negligence and the burden is on him to rebut it.

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Murray v. Marshall, supra; Nutt v. Davison, 54 Colo. 586, 131 Pac. 390, 44 L. R. A. (N. S.) 1170.

The supersedeas should be denied, and judgment affirmed.

MR. JUSTICE BAILEY and MR. JUSTICE TELLER concur.

No. 9886.

ROSE v. THE AGRICULTURAL DITCH AND RESERVOIR CO.

Decided November 8, 1920.

On motion to strike bill of exceptions.

Motion Denied.

1. APPEAL AND ERROR—*Bill of Exceptions—Time for Allowance.* Under sec. 1, ch. 6, S. L. 1911 providing for allowance of exceptions, the time for presentation and allowance of the bill may be extended beyond the 60 day limit by consent.

Messrs. MELVILLE, MELVILLE & WALTON, for plaintiff in error.

Messrs. DUBBS & VIDAL, Messrs. GARWOOD & GARWOOD, for defendant in error.

MR. JUSTICE DENISON delivered the opinion of the court.

DEFENDANT in error moves to strike the bill of exceptions because not allowed in time. The court below, within sixty days mentioned in S. L. 1911, pp. 9 and 10, § 1, granted time beyond the term for presenting the bill of exceptions for allowance. Further time was afterwards repeatedly granted, the last several times by consent of the attorney for defendant in error.

In *Ransom v. Holland,* 66 Colo. 420, 182 Pac. 885, we held that the court could not, after the expiration of the sixty days limit, grant any further extension. In that case, however, the last extension was granted without the consent of the defendant in error.

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The question now presented is whether, with only such consent, the time can be extended. We have no doubt that it can.

The argument against this conclusion is not without force, *i. e.*, that the court has no jurisdiction, after the term, to extend, except by and according to the terms of the statute and that consent cannot confer jurisdiction.

The flaw in this argument may be in the use of the word "jurisdiction." There is much doubt whether the objection in question goes to the jurisdiction. See *Greig v. Clement*, 20 Colo. 167, 173, 37 Pac. 960, but letting that pass, the question is forestalled in this state. *Murphy v. Cunningham*, 1 Colo. 467; *Rhoades v. Drummond*, 3 Colo. 374; *City of Central v. Wilcoxen*, 3 Colo. 566, 570; *Learned v. Tritch*, 6 Colo. 579, 580; *Greig v. Clement*, 20 Colo. 167, 37 Pac. 960; *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272, 384; *Robinson v. D. & R. G. Co.*, 24 Colo. 98, 49 Pac. 37; *Mackey v. Monahan*, 13 Colo. App. 144, 148, 56 Pac. 680; *County Comrs. v. Tulley*, 17 Colo. App. 113, 114, 67 Pac. 346; *Merriner v. Jeppson*, 19 Colo. App. 218, 219, 74 Pac. 341; *Pagosa Springs v. People*, 23 Colo. App. 479, 481, 130 Pac. 618.

Defendant in error urges that the consent must be given within the time in which the court might legally make the order. What difference could that make? If the power depends on consent what difference can it make when the consent be given?

Murphy v. Cunningham goes further than is here necessary. In the absence of both order and stipulation it implies both from conduct of defendant in error in this court.

In several of the cases above cited the question turned on an order or consent of *laches* which took place after the time for allowance had passed.

In *Robinson v. D. & R. G.*, 24 Colo. 98, 49 Pac. 37, the court hold that *laches* waives the objection that the order is entered too late. If laches can do that *a fortiori* can consent do so. So of *Central v. Wilcoxen*, 3 Colo. 566, 570; *Learned v. Tritch*, 6 Colo. 579, 580; *Mackey v. Monahan*, 13 Colo. App. 144, 146, 56 Pac. 680; *County Com'rs v. Tulley*,

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17 Colo. App. 113, 114, 67 Pac. 346; *Merriner v. Jeppson*, 19 Colo. App. 218, 219, 74 Pac. 341; *Pagosa Springs v. People*, 23 Colo. App. 479, 481, 130 Pac. 618.

We call attention to the case of *Mogote-Northeastern Con. D. Co. v. Gallegos*, decided at the present term.

Motion denied.

MR. JUSTICE TELLER, sitting for MR. JUSTICE SCOTT.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE TELLER concur.

No. 9894.

PERRY, ET AL. *v.* WHITE.

Decided November 8, 1920.

Action to recover possession of leased real estate. Judgment for plaintiff.

Reversed.

On Application for Supersedeas.

1. PLEADING—*Complaint—Action for Possession of Real Property.* In an action for possession of real property under chap. 23 of the code, a complaint is insufficient which lacks the allegation, that the plaintiff is entitled to possession, which is required by sec. 286.

2. *Complaint—Forcible Entry and Detainer.* A complaint under the forcible entry and detainer act, where the only breach is failure to pay rent, is deficient, if it does not show three days' notice in writing requiring in the alternative the payment of rent or possession of the premises.

3. LEASE—*Construction a Question for the Court.* What a lease contains is a question for the court and ought not to be submitted to a jury for determination.

4. EJECTMENT—*Termination of Lease—Action for Rent.* A suit in ejectment by a landlord against a lessee is an irrevocable elec-

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tion to declare the lease terminated. A suit, for rent which accrues subsequent to such termination, cannot be maintained and the receipt of rent after suit is instituted does not revoke the forfeiture.

5. LANDLORD AND TENANT—*Action for Mesne Profits or Damages.* The remedy open to a landlord for rent of premises after termination of a lease is an action for mesne profits or damages.

While these might be recovered under code chap. 23, they cannot be in an action of forcible entry.

6. *Receipt of Rent—Waiver of Forfeiture.* If a landlord by mistake of fact or law, demands and has judgment for more rent than he is entitled to receive, he does not by that alone waive the forfeiture, to enforce which was the very purpose of his suit.

Error to the District Court of Las Animas County, Hon. A. F. Hollenbeck, Judge.

Mr. SAMUEL FREUDENTHAL, for plaintiffs in error.

Mr. J. A. JARAMILLO, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THIS was an action to recover possession of certain premises in Aguilar, Las Animas County, leased by the plaintiff to the defendants. There was a trial by jury, plaintiff had a verdict and judgment for possession and $400 rent; defendants bring error and ask for supersedeas.

One of the assignments of error is that the defendants' demurrer to the amended complaint was improperly overruled. A careful consideration of the matter forces us to the conclusion that this assignment is good.

The original complaint was filed in February, 1920, and in substance was as follows: First, That the defendants were partners, etc. Second, That on or about March 11th, 1918, plaintiff leased to the defendants, by written agreement, certain premises, describing them, for the agreed rental of $100 per month, payable monthly in advance, which defendants agreed to pay. Third, That defendants

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entered into possession and have not paid the rent for four months, amounting to $400. Fourth, That the plaintiff was the owner and seized in fee of the above described premises; Fifth, That the defendants are in possession and "unlawfully withhold the same although having been notified in writing to surrender and vacate said premises." Prayer for judgment for $400 rent, $1,000 damages, general relief and possession of the premises.

Upon motion of defendants the court required the plaintiff to make his complaint more definite and certain by including therein the notice and stating the time of its service. The record does not show that anything was done pursuant to this order except to file the notice or a copy thereof with the Clerk of the Court.

Paragraphs 4 and 5 would indicate that the pleader intended the action to be under Chap. 23 of the Code; but it is insufficient for that purpose because it lacks the allegation that the plaintiff is entitled to possession, which is required by § 286.

The complaint was also insufficient under the forcible entry and detainer act because, the only breach being failure to pay rent, it fails to show "three days notice in writing * * * requiring in the alternative the payment of the rent or the possession of the premises," required by subd. 4 of Sec. 4 of the chapter on forcible entry and detainer.

The court instructed the jury that if they believed from the evidence that the lease contained certain provisions they should find so and so. This was of course erroneous. What the lease contained was a question for the court. Moreover, in this case the lease did not contain the provisions recited in the instruction.

It is urged by the plaintiffs in error that the lessor waived forfeiture of the term by asking during the trial for rent which accrued after the notice of the termination of the tenancy, and it is also claimed that the court erred in not granting a new trial upon the defendants showing that after the verdict the plaintiff had brought suit against

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the defendants in another (the county) court to recover rents accruing after the notice of termination, claiming that by bringing such suit the plaintiff had waived the forfeiture.

We do not think these points are well taken. It has been held upon what seems to us unanswerable argument that a suit in ejectment by a landlord against the lessee is an irrevocable election to declare the lease terminated, and that suit for rents which accrue subsequent to such termination cannot be maintained and the receipt of rent after such suit begun does not revoke the forfeiture. *Jones v. Carter*, 15 M. & W, 718.

Conversely, it was held that the bringing of a suit for rent was an irrevocable election to waive the forfeiture. *Dendy v. Nicholl*, 4 C. B. N. S., 376; 27 L. J. C. B., 6 Weekly Reporter, 502; 93 E. C. L. 376.

It follows that neither the claim for rent made during the trial of this cause nor the suit in the county court, waived the forfeiture.

Since the notice shown in the evidence terminated the tenancy upon February 1st, we think the allowance of a recovery of February rent was erroneous. There can be no rent *eo nomine* where there is no tenancy. The landlord in such case is left to his action for mesne profits or damages. While these might be recovered in an action under Chapter 23 of the Code they cannot in the action of forcible entry. *Robinson v. Crummer*, 5 Gilman, 218.

It is perhaps difficult to determine, in the light of these two English cases, the effect of the demand and recovery of four hundred dollars rent in this suit itself, but we are inclined to the opinion that if the plaintiff, by mistake of fact or law, demanded and had judgment for more rent than he was entitled to he did not by that alone waive the forfeiture to enforce which was the very purpose of his suit.

We think it must be said that the demand and the judgment were upon the theory that the February rent was "due and payable at the time of the commencement of the action," under G. S. § 2614, in which case they would not be

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a recognition of the continued existence of the lease and so not a waiver, even though, as we hold, that rent was not then due and payable.

Plaintiffs in error claim that they have tendered the rent and so in equity have tolled the forfeiture; but we think no tender is shown.

The case must be reversed and remanded for further proceedings not inconsistent with this opinion, with leave to the plaintiff to amend his complaint.

MR. JUSTICE TELLER and MR. JUSTICE BAILEY concur.

No. 9896.

FLORA v. THE JULESBURG MOTOR COMPANY.

Decided November 8, 1920.

Action by mortgagee for possession of a motor truck. Judgment for defendant.

Reversed.

On Application for Supersedeas.

1. CHATTEL MORTGAGE—*Record in Foreign State—Removal of Property.* A motor truck was purchased in Colorado by a farmer living a few miles across the state line in Nebraska, and to secure the payment of the purchase price, he executed a chattel mortgage on the machine, which was recorded in Nebraska. In the transaction of his business, he drove the truck across the state line into Colorado from time to time. *Held*, that this did not constitute a removal in the sense in which that word is used in the cases on this subject; that the mortgage was properly recorded in Nebraska; and that the mortgage lien was superior to those afterwards acquired in Colorado.

Error to the District Court of Sedgwick County, Hon. L. C. Stephenson, Judge.

Messrs. ALLEN & WEBSTER, for plaintiff in error.

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Messrs. MUNSON & MUNSON, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

FLORA, plaintiff in error and plaintiff below, brought replevin against the Motor Company for a Ford truck. The defendant had judgment. Plaintiff comes here on error and moves for a supersedeas.

Plaintiff was a resident of Julesburg, which is a mile distant from the Nebraska line, and the defendant operated a garage in that place. Stainbrook, a farmer, lived eight or ten miles over the line in Nebraska. He bought a Ford truck of Flora at Julesburg and gave a chattel mortgage to secure the purchase price. He took the truck to his house in Nebraska and Flora recorded his mortgage in that state. Stainbrook came to Julesburg with the truck from time to time to dispose of his produce and make purchases and for other ordinary purposes, which Flora knew. Flora went to California and when he returned found the truck in possession of the defendant motor company. They claimed it as a pledge for a debt of Stainbrook who had absconded. When the pledge was made the president of defendant company who transacted the business did not know where Stainbrook lived and so examined the records in Julesburg and found no mortgage. Flora then brought the present suit, claiming right of possession by virtue of his chattel mortgage.

The question is whether the mortgage recorded only in Nebraska is superior to the lien of the Motor Company.

What force a mortgage recorded in another state may have under such circumstances is a matter of comity, subject to the legislation of the state in which the mortgage is sought to be enforced. In this state we have no legislation on the subject and comity between the states, as interpreted by the various decisions of the courts, must therefore guide us in deciding this question. There is great diversity in the decisions. Some courts, including, we believe, the courts of Michigan, give a mortgage recorded only in

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another state no force. The courts of Vermont originally held substantially likewise, *Skiff v. Solace*, 23 Vt. 279, but afterwards repudiated that case and held that Vermont had no right to decline to enforce a title or lien valid in the state where it was created. *Taylor v. Boardman*, 25 Vt. 581; *Jones v. Taylor*, 30 Vt. 42; *Cobb v. Buswell*, 37 Vt. 337; *Norris v. Sowles*, 57 Vt. 360. The opinions in these cases present arguments of very great weight.

Some states hold that if the chattel is removed without the knowledge or consent of the mortgagee, comity requires that the mortgage be enforced,—but otherwise if with his knowledge and consent. Strong arguments are presented for these conclusions. The Federal courts seem to favor this rule. *Hoyt v. Zibell*, 259 Fed. 186, 170 C. C. A. 254; *Shapard v. Hynes*, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675. The cases are gathered in 11 C. J., at p. 424. See also 5 R. C. L. 400.

The plaintiff in error, without disputing these cases, claims that there was in the present case no removal of the truck from Nebraska; that an occasional transfer from time to time across the line for ordinary business purposes does not constitute a removal, and that therefore there is no reason why the mortgage should not be enforced and no case supporting the position of the defendant in error except those which hold that the mortgage is without any force outside of the state where it is recorded. He cites *Peterson v. Kaigler*, 78 Ga. 464, 3 S. E. 655; *Handley v. Harris*, 48 Kan. 606, 29 Pac. 1145, 17 L. R. A. 703, 30 Am. St. Rep. 322, and *Shapard v. Hynes, supra.*

The defendant in error, on the other hand, says that this bringing of the truck into Julesburg from time to time on business constituted a removal, and that since Flora knew of the habit and made no objection he practically consented to it. His citations are all cases where the removal was of a more or less permanent character.

We agree with the plaintiff in error on this point. We do not decide whether the evidence is sufficient to show knowledge or consent on the part of Flora, nor whether if

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there had been, with or without his consent, a removal of the truck to Colorado, the mortgage would have been good or bad, but we are of the opinion that driving the truck from time to time across the state line to Julesburg was not a removal in the sense in which that word is used in the cases on this subject. Some light on this point may be obtained from *Barstow v. Stone,* 10 Colo. App., 396, 405, 52 Pac. 48, and *Ware v. Schintz,* 190 Ill. 192, 60 N. E. 67, where the word "removal," referring to a trustee in a deed of trust, was held to mean a permanent and not temporary absence.

If ordinary use of an article as movable as a horse and wagon or automobile amounts to a removal of it from place to place, then under our ordinary forms of chattel mortgage a mortgagor in Englewood could not drive a mile north into Denver without subjecting his property to immediate foreclosure. A mortgagor in Denver could scarcely take an afternoon ride without the same result. It is so manifestly unjust that the mere crossing the state line in the ordinary use of a mortgaged chattel should subject the mortgage lien to other claims unless the mortgagee shall record the mortgage in every county in every state where the mortgagor is likely to go, that we are clear that comity requires us to hold that, under such circumstances, the mortgage lien remains superior to those afterwards acquired in this state.

The mortgage describes the property as situated in Deuel County, Neb., and it was understood that it was to be immediately taken there. Deuel County, then, was the proper place for record. *Stitt v. Spengel Co.,* 58 Colo. 559, 146 Pac. 770. The Colorado statute requires the mortgage to be recorded where the chattel is "situated." *Ib.* It is questionable whether to record it elsewhere would give constructive notice.

The judgment should be reversed with directions to enter judgment for the plaintiff.

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No. 9946.

BROWN v. VAN CISE, ET AL.

Decided November 8, 1920.

Action to restrain election officials from proceeding under a certificate of nomination alleged not to have been filed in the proper office. Injunction granted.

Affirmed.

1. ELECTIONS—*Certificate of nomination—Filing.* Under the provisions of sec. 26, Ch. 4, S. L. 1910, providing that a certificate of nomination for an office to be filled by the voters of a district greater than a county shall be filed with the secretary of state, a certificate of nomination for the office of district attorney of the second judicial district should be filed with the secretary of state, notwithstanding the boundaries of the district were coincident with those of the county.

2. WORDS AND PHRASES—*"District greater than a county"* is intended to refer to that kind of a district which is commonly greater than a county. The coincidence of the boundaries of a district with those of a county in a particular instance is of no consequence.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. PHILIP HORNBEIN, Mr. BERNARD J. FORD, for plaintiff in error.

Mr. HENRY E. MAY, Mr. WM. R. EATON, Mr. BENJAMIN GRIFFITH, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

CERTAIN parties filed with the Election Commission of Denver a certificate nominating James H. Brown as a candidate for the office of District Attorney of the Second Judicial District. The boundaries of that district are coincident with those of the City and County of Denver and it

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is the only judicial district which does not comprise more than one county.

Van Cise, defendant in error, brought suit in the District Court and obtained an injunction forbidding further procedure under the certificate, on the grounds, inter alia, that it was not filed in the proper place, viz., the office of Secretary of State, nor within the proper time, viz.,—thirty days before election. Brown brings error.

He relies on § 26 of the Act of 1910 concerning elections: "said certificate * * * shall be filed with the Secretary of State, when for an office or offices to be filled by the voters of the entire State or of any division or district greater than a county; with the county clerk when for an office or offices to be filled by the voters of an entire county * * *. The certificates * * * to be filed with the Secretary of State shall be filed not * * * less than thirty days * * * and the certificates * * * to be filed with the county clerk not * * * less than fifteen days before the day of election."

In Denver the election commission takes the place of the county clerk.

The contention of plaintiff in error, of course, is that since the bounds of the Second Judicial District are the same as those of a county, it is not a district "greater than a county." We are all agreed, however, that by the words "district greater than a county" the statute intended to refer to that kind of district which is commonly greater than a county, and that the coincidence of a district's boundaries with those of a county is of no consequence. The office in question is an office of that kind of district which is greater than a county.

This interpretation better accords with the rest of the Act; for example: otherwise we must say that the legislature neglected, in § 9, to provide for the placing of the name of a candidate for any office of the second judicial district on the primary ballot; moreover it seems to us most improbable that the legislature intended that some candidates for the office of district attorney or district judge should

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file certificates with the Secretary of State and others elsewhere. The judgment is affirmed.

MR. JUSTICE SCOTT and MR. JUSTICE BURKE not participating.

No. 9699.

FREY v. PAUL, ET AL.

Decided November 8, 1920.

Action to quiet title to an irrigation ditch and water right. Judgment for defendants.

Affirmed.

1. WATER RIGHTS—*Quieting title—Statute of limitations.* In an action to quiet title to irrigation ditches, one who pleads the seven year statute of limitations is not required in the first instance to either prove payment of taxes or nonassessment.

Error to the District Court of Chaffee County, Hon. James L. Cooper, Judge.

Mr. G. K. HARTENSTEIN, for plaintiff in error.

Mr. GILBERT A. WALKER, Mr. ALVIS L. JEFFREY, Mr. EDWIN H. STINEMEYER, for defendants in error.

Department One.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error brought this action against defendants in error to quiet title to a certain irrigation ditch and adjudicated water right. Defendants pleaded title in themselves, and also set up the seven year statute of limitations, sec. 4089, R. S., 1908. From a judgment for defendants plaintiff brings the cause here for review. Other matters were included in the action, and other questions decided, none of which require our consideration.

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Sec. 4089 R. S., 1908 requires only of claimant thereunder that he "pay all taxes legally assessed" during the running thereof. Sec. 5546 R. S., 1908, provides, "that all ditches used for the purpose of irrigation, and that only where the water is not sold for the purpose of deriving a revenue therefrom, be and the same are hereby declared free from all taxation, whether for State, County or municipal purposes."

No evidence was offered on the trial by plaintiff or defendants as to the levy of any taxes on the property in question. It is perfectly clear that if no taxes were assessed, no payment was required. The question between the parties here is upon which rests the burden of proof on this subject. Plaintiff says on defendants under the general rule as laid down in *Evans v. Welch,* 29 Colo. 355, 364, 68 Pac. 776, and the special application thereof apparently made in *Laughlin v. Denver,* 24 Colo. 255, 50 Pac. 917. Defendants concede the general rule but contend that by virtue of said sec. 5546, R. S. 1908 irrigation ditches are an exception. In *Laughlin v. Denver, Supra,* the court expressly found that there was no proof of color of title. Without color of title the payment of taxes was immaterial. No other Colorado authority in point is called to our attention. Plaintiff cites three Illinois cases upon which much stress is laid because our statute came from that State. *Wisner v. Chamberlin,* 117 Ill. 568, 7 N. E. 68; *Ill. Cen. R. Co. v. Cavins,* 238 Ill. 380, 87 N. E. 371; *Donahue v. Ill. Cen. R. Co.,* 165 Ill. 640, 46 N. E. 714. But the act was adopted here in 1874, prior to the Illinois decisions, hence they stand upon the same footing as authority as do those of other jurisdictions. In the last of these cases the phrase, "Taxes legally assessed," is considered and the payment of an illegal assessment held insufficient. In the other two no weight seems to be given the phrase. The holding in both being that non-assessable property is not within the statute.

Reason would seem to require that in dealing with property generally non-assessable the burden of proof should be assumed by one whose rights depend for their mainte-

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nance upon an exception. Such has been the holding in California with the exception of *Reynolds v. Willard,* 80 Cal. 605, 22 Pac. 262; *Oneto v. Restano,* 78 Cal. 374, 379, 20 Pac. 743, 746; *Monroe v. Pleasants,* 182 Pac. 330. This construction is also supported by the following: Weil, Water Rights (2nd Ed.) Sec. 251, p. 381; 2 Kinney on Irrigation (2nd Ed.) Sec. 1054, p. 1893.

We are therefore of the opinion that in actions to quiet title to irrigation ditches, one who pleads the seven year statute of limitations is not required in the first instance either to prove payment of taxes or non-assessment.

The judgment is accordingly affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE TELLER concur.

No. 9903.

CARLSON, AS PUBLIC TRUSTEE, ET AL. v. HOWES.

Decided November 8, 1920.

Action against a public trustee to compel by mandamus the execution and delivery of a second trustee's deed. Writ granted.

Reversed.

On Application for Supersedeas.

1. REAL PROPERTY—*Public Trustee—Trustee's Deed.* A deed was issued by a public trustee one day before the expiration of the nine months period of redemption prescribed by section 6869, R. S. 1908. In an action against the trustee to compel the issuance of a second deed to a judgment creditor who claimed the right of redemption, *Held,* that the first deed, although irregular, passed the legal title, and the power of sale was extinguished, so far as the trustee was concerned.

2. ACTION—*Mandamus.* A public trustee having deeded property under the terms of a trust deed has nothing left to convey and man-

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damus will not lie against him to compel the transfer of the property to another who claims the right of redemption.

Error to the County Court of Eagle County, Hon. L. B. Tague, Judge.

Mr. JAMES DILTZ, Mr. JOHN L. NOONAN, for plaintiffs in error.

Mr. W. J. MEEHAN, for defendant in error.

MR. JUSTICE BAILEY delivered the opinion of the court.

THIS action was brought in the County Court of Eagle County by T. A. Howes, against A. F. Carlson, Public Trustee of Eagle County, to compel the latter by mandamus to accept money tendered in redemption of certain real estate theretofore sold by Carlson as Public Trustee, and to execute and deliver a trustee's deed for such property to Howes, who claimed the right to redeem as a judgment creditor, under section 6869, R. S. 1908. The Public Trustee refused to accept the money or execute the deed.

The complaint sets out the following facts: that a deed of trust was duly made, executed and delivered by Burton E. and Diana E. Yeoman to the Public Trustee for the use of White Brothers, to secure the payment of $1,000.00 upon the lands in question; that by virtue of such trust deed, and power therein contained, the Public Trustee advertised and sold the lands therein described to E. E. Glenn & Company on September 19th, 1918; that E. E. Glenn & Company were beneficiaries named in a second trust deed upon the same property, under which latter deed the lands were also sold to them on the same date; that Howes, as judgment creditor, on the 17th day of June, 1919, tendered to the Public Trustee a sufficient amount of lawful money to redeem the property from both of these sales, but that the tender was refused, on the ground that the Public Trustee had already issued his trustee's deed for the land, and had no further interest or title to convey. The petition was attacked by general demurrer, which was overruled, and the trial court awarded the writ as prayed. On this state

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of the record defendant brings the cause here for review on error.

It appears that the trustee's deed was issued on the 17th of June, 1919, one day less than nine months after the sale of the property, and therefore within the period of redemption prescribed by section 6869, R. S. 1908. For this reason it is urged that the judgment of the trial court should be affirmed. The only question to determine is whether, after having conveyed the property, either with or without legal right, the Public Trustee has anything left under the provisions of the trust deed to convey. We answer in the negative. Such being the situation there is nothing upon which to base the mandamus action. That the first trustee's deed, although irregular, passed all title which the Public Trustee had, is determined in 17 Colo. 489, *Stephens v. Clay*, 30 Pac. 43, 31 Am. St. Rep. 328.

In that case there was a fatal error by the Public Trustee in advertising the sale, which he attempted to correct by again advertising and selling the property. In discussing the effect of the first deed the court, at page 491, said:

"The decision of the case at bar depends upon the effect of the first attempted sale and deed by the trustee. That there was a fatal error on his part in advertising the sale is not questioned; but if the deed executed in pursuance thereof conveyed the trustee's legal title, his subsequent attempted sale and deed were ineffectual to destroy appellee's right of redemption. If, on the contrary, the trustee's first deed was of no force or effect whatever for any purpose, the legal title remained in him, and his second sale and deed being regular, divested appellee's equity of redemption.

"Trust deeds given as security, and mortgages containing a power of sale, vest the legal title in the trustee. The equity of redemption or equitable title, remains in the mortgagor or 'trustor,' *i. e.*, the owner. The legal title of the trustee is supplemented by a power which authorizes him upon default in payment of the mortgage debt, to advertise and sell the property; the right to exercise this power, as we shall presently see, being dependent upon his possession

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of such legal title. The object of the power of sale is not to enable him to convey the legal title vested in himself, but to clothe him with authority to sell and convey the equitable title remaining in the trustor. He may divest himself of the legal title without compliance with the conditions of the trust. But a sale and deed except in strict compliance with the power specified, is of no effect whatever so far as the trustor's equitable estate is concerned. If the trustee, in disobedience of the trust conditions, by deed transfers the legal title, his grantee takes only the trustee's interest. He steps into the trustee's shoes, so to speak, and holds subject to all the reserved rights of the trustor. Neither courts of law nor courts of equity regard the trustee's deed as absolutely void. Both recognize the fact that it conveys the legal title. The difference is that the grantee's title or ownership cannot be challenged at law, while equity treats him as a successor to the trust and protects the trustor's estate. Equity does not vacate the trustee's deed, and regard the title as remaining in him. * * * Upon delivery of his deed the original trustee ceases both at law and in equity to have any further interest in the property. The power of sale is extinguished so far as he is concerned, leaving him in the same position as a total stranger. And an effort on his part to exercise the power originally vested in him, by an attempted resale or a second deed, is of no more force or effect than if the same proceedings were taken by one who never had been connected with the title. *Koester v. Burke,* 81 Ill. 433; *Wells v. Caywood,* 3 Colo. 487; *Doe v. Robinson,* 24 Miss. 688; *Huckabee v. Billingsly,* 16 Ala. 414; *Taylor v. King,* 6 Munford (Va.) 358; *Cranston v. Crane,* 97 Mass. 459; *Fulton v. Johnson,* 23 W. Va. 95.

The above citation fully and correctly states the law as to the case at bar on this point. Although it is urged that *Stephens v. Clay, supra,* does not apply because it was determined under another statute governing the foreclosure of lands under trust deed, we think that point not well taken, as neither under the former statute nor the present one can a different effect be given a conveyance such as is

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here involved than is given it in that case. Plainly Howes has mistaken his remedy, which possibly may be a suit in equity, wherein all parties in interest should be brought in, the title quieted, and the redemption money properly distributed, or some other appropriate proceeding.

The judgment of the trial court is reversed and the cause remanded, with leave to the parties to further proceed as they may be advised.

Judgment reversed and cause remanded.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE ALLEN concur.

No. 9596.

PLUE v. THE PEOPLE.

Decided November 8, 1920.

Plaintiff in error was convicted of violations of the prohibition act of 1915.

Affirmed.

1. CRIMINAL LAW—*Intoxicating Liquors—Instigation of Crime by State Officials or Witnesses.* On a review of the evidence it is held that there was no such entrapment or instigation as to prevent the defendant's acts in keeping, offering for sale and selling intoxicating liquors, from being criminal.

Error to the District Court of the City and County of Denver, Hon. Greeley W. Whitford, Judge.

MR. JOHN A. DEWEESE, MR. JOHN L. MCPHAIL, for plaintiff in error.

MR. VICTOR E. KEYES, Attorney General, MR. CHAS H. SHERRICK, Assistant, for the people.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

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The defendant, plaintiff in error here, was convicted of violations of the prohibition act of 1915 (Ch. 98, p. 275, S. L. 1915). He was found guilty of unlawfully keeping intoxicating liquor for sale, of offering for sale, and of selling intoxicating liquor in violation of the statute.

The assignment of error to which most of the argument is directed, relates to the refusal of the trial court to direct a verdict of acquittal. In this connection the contention of the defendant is, in effect, that the alleged offenses were instigated by witnesses and officers of the state, and that, therefore, his acts were not criminal or punishable.

Klein, a police officer, arranged with one Woods "to get some one to bring" intoxicating liquor to the residence of one J. W. Noon. Woods then went to Noon and asked him to procure some whiskey for his, Woods', friends. Thereafter Noon requested the defendant to bring liquor to his home. The defendant complied with this request, bringing to Noon's house two packages, each containing twelve pints of whiskey. Klein and Schneider, another police officer, appeared at Noon's home as the friends for whom Woods acted. They were there when the defendant arrived with the liquor, and arrested him when he delivered the whiskey to Noon.

Noon never had any intention of entrapping the defendant. He was acquainted with him, and merely intended to buy the whiskey for others whom he did not suppose desired to entrap the defendant. There is no evidence that Noon or any one else induced, or even encouraged, the defendant to violate the law. None of the witnesses for the state, so far as the record shows, had anything to do with the willingness of the defendant to sell, or to have in his possession for sale, intoxicating liquor. In addition to the whiskey which he delivered to Noon, for which he expected to receive $45.00, the defendant had four more packages of liquor in the automobile in which he arrived at Noon's home. This was a circumstance, in addition to other facts herein mentioned, showing that the defendant was not incited, induced, or even encouraged, to violate the law by

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reason of anything done by any officer or witness for the state.

There was no such entrapment or instigation as to prevent the defendant's acts from being criminal. *People v. Chipman*, 31 Colo. 90, 71 Pac. 1108; *Fiunkin v. U. S.*, 265 Fed. 1; 16 C. J. 88, sec. 57, and cases cited. The judgment is affirmed.

MR. JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 9614.

THE DENVER & RIO GRANDE RAILROAD CO. *v.* JOHNSON, ET AL.

Decided November 8, 1920.

Action against a railroad company for loss of goods by fire. Judgment for plaintiffs.

Reversed.

1. RAILROADS—*Liability as Warehouseman.* Where there is no negligence on the part of a railroad company, it will not be liable as a warehouseman or bailee, for the loss of goods by fire.

2. *Delivery of Goods—Receipt.* Where goods have reached their destination and the consignee gives his receipt for the same, there is a final delivery and it makes no difference that a part of the goods are temporarily left on the carrier's premises.

3. *Liability for loss of goods.* Where the consignee gives his receipt to a railroad company for goods shipped to him over its line, and removes a part of them, the company will not be liable for damage to, or destruction by fire of the goods remaining on its property.

Error to the District Court of Costilla County, Hon. Jesse C. Wiley, Judge.

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Mr. E. N. CLARK, Mr. G. A. LUXFORD, for plaintiff in error.

Mr. W. W. PLATT, for defendants in error.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action for damages for the destruction or injury by fire of certain goods contained in a warehouse and in a freight car of a common carrier, the defendant in this case. The property had been in transit, on defendant's railroad, and had reached its destination. The plaintiffs were the consignees to whom the merchandise in question had been shipped. The cause was tried on agreed facts. Judgment was for plaintiffs, and defendant has sued out this writ of error.

It was stipulated at the trial that the defendant was guilty of no negligence. This admitted fact relieves the defendant of any liability as a warehouseman or bailee. 10 C. J. 246. Plaintiffs' recovery is sought upon the theory that, under the agreed facts and with reference to the property in question, the defendant is liable as a common carrier, under the rule that a common carrier is liable for all loss or destruction of, or injury to, such goods as are in his possession as carrier. The correctness of this theory is the only question to be determined upon this review, and the following are the facts which are material in this connection:

On July 2, 1916, the defendant in its capacity as a common carrier was transporting certain merchandise, consisting of auto casings and horse nails, billed to the plaintiffs at Blanca, Colorado. These goods, on that day, arrived at Blanca, and were unloaded and placed by the defendant in its warehouse at that point. On the same day the defendant was transporting a car of hardware, billed to the plaintiffs, and the car arrived at Blanca. It was spotted at the usual and convenient place for unloading, after 6 o'clock P. M. On the next day, July 3, 1916, and at about

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9 o'clock A. M., the defendant's agent at Blanca notified the plaintiffs that the above mentioned goods and hardware had arrived. Some time during that forenoon the plaintiffs signed "lists of said goods, commonly known as 'receipts,' covering all of said goods and hardware." The agreed statement of facts further recites:

"That plaintiffs broke the seal of C. E. & I. car 2697, containing the aforesaid hardware, and unloaded from it into a farmer's wagon one wagonload of wire fence contained in said shipment, and thereupon closed and securely locked said car, during the afternoon of July 3, 1916. The auto casings and horse nails were not removed from defendant's warehouse, although plaintiffs had access to said warehouse and said goods and hardware at all times during the day of July 3, 1916."

At about 2 o'clock A. M. of July 4, 1916, the freight depot and warehouse of the defendant, and the freight car above mentioned, were discovered to be on fire, and were soon burned and destroyed. The destruction of, or injury to, the merchandise consigned to the plaintiffs and which had not yet been removed from the car and from the warehouse, was caused by this fire.

The plaintiffs rely upon the rule that the extraordinary liability of the carrier continues until the consignee has had a reasonable time in which to remove the goods. This rule, however, is usually applied in cases where the shipment, on its arrival at the destination, is awaiting delivery to the consignee. In 10 C. J. 235, the rule is discussed under the heading: "Custody Awaiting Delivery to Consignee." In *D. & R. G. R. R. Co. v. Peterson*, 30 Colo. 77, 69 Pac. 578, 97 Am. St. Rep. 76, cited by plaintiffs, the goods were awaiting delivery, at the time of their destruction by fire.

In the instant case there was a delivery. The signing of the receipts was a delivery of all of the goods involved in this case. In 10 C. J. 248, it is said:

"Where the goods have reached their destination and the consignee gives his receipt for the same, there is a final delivery, and it makes no difference that a part of the

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goods are temporarily left on the carrier's premises."

As to the hardware in the car, the plaintiffs assumed control of the same. They had broken the seal and entered the car before the fire occurred. This shows final delivery. 1 Moore on Carriers, p. 200. After completion of the contract of carriage and complete delivery to and acceptance by the consignee, the common carrier is not liable, as such, for loss or injury to the shipment thereafter occurring. 10 C. J. 247, sec. 350; 4 R. C. L. 759, sec. 226. A headnote in the Pacific Reporter to the opinion of this court in *Lynch v. Union Pac. R. Co.*, 65 Colo. 152, 172 Pac. 1062, reads as follows:

"Where railway delivers a carload of vegetables to consignee, who accepts same and starts removing vegetables from the car, the railway's responsibility for the safety of the vegetables ceases; and, where vegetables remaining in the car freeze, the railway is not liable for damages sustained."

Upon the principles announced or applied in the authorities above cited, the defendant in the instant case is not liable, and it was error to render judgment for plaintiffs.

The judgment is reversed, and the cause remanded with directions to dismiss the action.

MR. JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 9922.

DELAMATER v. GRAVES, ET AL.

Decided November 8, 1920.

Proceeding involving contempt of court for violation of an order concerning the custody of minor children. Plaintiff in error found guilty of contempt.

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Affirmed.

On Application for Supersedeas.

1. CONTEMPT—*Order of Court—Order of foreign court.* A valid order entered by a Colorado court must be obeyed and a foreign court cannot affect, vacate or annul it.

2. *Order of court—Relief from.* The remedy of a party desiring to be relieved from obeying a court order, is to take formal steps for its vacation, and not to impeach it in contempt proceedings brought to punish a disobedience thereof.

Error to the District Court of La Plata County, Hon. W. N. Searcy, Judge.

Messrs. PERKINS & PERKINS, for plaintiff in error.

Mr. JOHN B. O'ROURKE, Mr. BARRY SULLIVAN, Messrs. RUSSELL & REESE, for defendants in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THE plaintiff in error, Charles W. DeLaMater, was adjudged guilty of contempt of court. The cause is before us upon his application for a supersedeas.

Prior to April 30, 1920, the plaintiff in error and Bertha L. DeLaMater were husband and wife. Their matrimonial domicile was in the state of New Mexico. They were parents of two minor children.

On the date above mentioned, the plaintiff in error obtained, in the district court of San Juan County, New Mexico, a decree of divorce. The decree provided that the minor children remain, for the time being, at the home of their grandmother in Durango, Colorado, but that their father, the plaintiff in error here, have custody of them for one month, at the end of which time he "shall return the children to their mother." It was further provided in the decree that thereafter the temporary custody of the children should belong to the mother, the father to have the privilege of visiting the children and of having them visit him.

On May 3, 1920, the plaintiff in error instituted proceed-

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ings in the District Court of La Plata County, Colorado to obtain the custody of the children. He filed a petition for a writ of habeas corpus, against his wife and her mother, as respondents, alleging that they wrongfully "retain the custody of said minor children," and praying that they be required to show cause why the care and custody of the children should not be awarded to him pursuant to the decree of the New Mexico court. The writ was issued, and respondents each made a return thereto. On May 8, 1920, it was ordered by the court that the petitioner, the plaintiff in error here, be awarded the custody of the children "for the period not exceeding 30 days commencing on May 8, 1920, and that then, within said 30 days, said children shall be by said petitioner Charles W. DeLaMater returned and delivered to the custody and possession of said respondent Bertha L. DeLaMater, at the home of her mother, Elvira J. Graves, at Durango, Colorado."

It is admitted that the order was disobeyed by the plaintiff in error in that he did not return the children to their mother within the thirty days prescribed, or at any other time. Based on this fact, contempt proceedings were instituted against him and he was adjudged guilty.

As showing cause why he should not be adjudged guilty of contempt, the plaintiff in error pleaded, among other things, that on June 1, 1920 the district court of San Juan County, New Mexico, modified the decree it had theretofore entered, and rendered a second decree which awarded the custody of the children "absolutely and unconditionally" to him, and that he has since retained the custody of the children "under the authority" of such decree.

Assuming that the second New Mexico decree was such as thus pleaded, and that it was proven in the contempt proceedings, the question to be determined is whether the plaintiff in error could rely upon such decree of a foreign state as a defense in these contempt proceedings.

The order which the plaintiff in error disobeyed was that he should, within thirty days, return and deliver the minor children to their mother at Durango, Colorado. This order

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he was bound to obey unless and until the court making it should vacate it in the meantime. No court in another state could affect that order. A foreign court could not expressly vacate or annul it. 15 C. J. 1184. It follows from this that no court of a sister state could affect an order of a court in this state by making some order in conflict, or rendering some decree inconsistent, therewith. The order in question was valid when made, and valid when disobeyed, and the rendition of the second New Mexico decree affords no defense in this contempt proceeding.

Assuming that the Colorado court was bound to give full force and effect to the New Mexico decree under the general rules of comity, it could not do so by simply regarding its own previous order or judgment as a nullity, since its jurisdiction could not be divested by anything done by a court of another state. The Colorado court might, however, vacate its order, but until it does so, the order must be obeyed. If facts arise which would justify a vacation of the order, that is no excuse for disobeying the order. The remedy of the party desiring to be relieved from the necessity of obeying the order is to take formal and due steps in the proceeding in which the order was made, and not to impeach the order in contempt proceedings brought to punish a disobedience thereof. *State ex rel. Tuthill, v. Giddings*, 98 Minn. 102, 107 N. W. 1048; 13 C. J. 44, sec. 59.

The application for a supersedeas is denied and the judgment is affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BAILEY concur.

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No. 9923.

IN RE BLOCKER.

Decided November 8, 1920.

Petition for writ of habeas corpus by an inmate of the penitentiary. Demurrer to petition overruled and petitioner discharged.

1. CRIMINAL LAW—*Statutory Construction.* If a statute is capable of more than one construction, that should prevail which operates in favor of liberty.

2. *Penitentiary Sentence—Deductions for Good Conduct—Computation.* Under sec. 4871, R. S. 1908, concerning deduction of time from penitentiary sentences for good conduct, 11 months service constitutes the first year, 10 months the second year, etc., and after the 5th year each 6 months service counts as one year.

Original Proceeding.

Mr. A. R. MORRISON, for petitioner.

Mr. S. HARRISON WHITE, Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES ROACH, deputy, for respondent.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS cause is before us upon a demurrer to the petition of John R. Blocker for a writ of habeas corpus. The petition was filed in this court on September 17, 1920. It alleges, among other things, that John R. Blocker, the petitioner, on September 9, 1911, was sentenced by the District Court of Fremont County, Colorado, to an imprisonment in the state penitentiary for and during the term of not less than ten years and not more than twelve years as a result of a certain judgment in a criminal case; that on the same date he began to serve his sentence; that on April 23, 1917 he escaped but was recaptured and returned

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to the penitentiary on the same day; that since that time he has performed faithfully all duties assigned to him therein; that the term of his sentence has expired; that he is entitled to his discharge from the penitentiary; and, that the warden refuses to discharge him and now unlawfully confines and detains him. The petition prays for a writ directed to the warden.

The attorney general, counsel for the petitioner, and counsel for the warden of the penitentiary, have filed a stipulation that before the writ shall issue, the warden may plead or demur to the petition. Pursuant to the stipulation a demurrer to the petition was filed. The demurrer alleges, in substance, that under the facts stated in the petition, the petitioner's sentence of imprisonment has not expired. The ultimate question to be determined is: Has the petitioner served his sentence?

Whether the petitioner has completed the term of his sentence, depends on the construction to be given to section 4871 R. S. 1908, which reads as follows:

"That every convict who is now, or may hereafter be, imprisoned in the penitentiary, and who shall have performed faithfully, and all who shall hereafter perform faithfully, the duties assigned to him or her during his or her imprisonment therein, shall be entitled to a deduction from the time of his or her sentence for the respective years thereof, and proportionately for any part of a year, when there shall be a fractional part of a year in the sentence, to-wit: For the first year, one month; for the second year, two months; for the third year, three months; for the fourth year, four months; for the fifth year, five months; for the sixth and each succeeding year, six months; *Provided*, That if any convict shall escape, or attempt to escape, from the penitentiary, he or she shall forfeit and lose any and all deductions from the time of his or her sentence which he or she may have been entitled to up to the time of the escape or attempted escape, as provided for in this section."

At the time the petitioner escaped, he had served 5 years, 7 months and 14 days. On account of such escape, under

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the statute he lost all the deductions he had theretofore earned, so that the actual time served must count only that much, and no more, time on the sentence, and of a twelve year term there would be left for him to serve 6 years, 4 months and 16 days, less the sum of deductions which he might earn after beginning to serve such remainder of the term.

The escape occurred during the sixth calendar year of the petitioner's confinement in the penitentiary. Whether the petitioner, after his return to the penitentiary, could earn any deductions for good behavior during the balance of that sixth year is immaterial. At any rate, at the close of the sixth calendar year, or September 9, 1917, he would have no more than six years yet to serve, less deductions earned after that date. Having served more than five years, these deductions would be based on that clause of the statute which allows a deduction of "six months" from the time of his sentence "for the sixth and each succeeding years" of the sentence.

The attorney general and counsel for the respondent contend that a convict must first serve twelve months before he can be credited with six months good time.

Counsel for the petitioner contends that a convict by serving six months with good behavior would be serving a year of the term, the remaining six months of the calendar year being the deduction for that particular year of the sentence.

According to the construction given to the statute by the petitioner, and taking September 9, 1917, as the beginning of the first of the six years of the sentence remaining for the prisoner to serve, the first of such years would be served by an actual confinement in the penitentiary of six months with good behavior, the remaining six months of that calendar year being deducted as a credit for that year. Thus the sentence as to that year would be completed in six months, or upon March 9, 1918, instead of upon September 9, 1918. By this method of computation the petitioner

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would have finished serving his sentence on September 9, 1920.

Under the petitioner's construction of the statute a convict would be entitled to his discharge at an earlier time than under the attorney general's construction. If the statute is capable of both constructions, that of the petitioner should prevail upon the principle that of two constructions the one should be adopted which operates in favor of liberty. 16 C. J. 1361. In our opinion the statute is capable of the construction which the petitioner places upon it, and upon the principle above stated we adopt it. Under this construction the statute is given effect in all cases. For example, if a convict has been sentenced for two years, the first year is completed in eleven months, and the second year of the term begins with the following month. Since the statute provides for a deduction of two months "for the second year," the second year would be completed in ten months. Thus a convict is enabled to obtain the benefit of the credit for each year of the sentence and during the same year in which it is earned. This would not be the result if the good time is computed under the method adopted by the attorney general and counsel for respondent. Under that system the prisoner would first serve a full twelve months before being entitled to a credit of one month on account of the first year of the sentence. That month, assuming that the sentence is for two years, would leave eleven months as the unexpired time of the sentence. The convict would serve these eleven months in order to complete the second year of his sentence. For this he would be entitled to a credit of two months on account of good behavior during such second year, but the credit would be of no avail to him, because there would remain no further time of the sentence to serve, or the time from which such deduction of two months could be made. Thus it appears that under this construction of the statute, or method of computation of good time, in many cases the prisoner would receive no benefit for good behavior during the last year of his confinement. This would partly defeat the ob-

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ject of the statute. In 21 R. C. L. 1192, sec. 28, it is said:

"The credits are said to be in the nature of a payment or reward by the state to the convict for his good behavior, in order to stimulate him to conform to the rules of the institution and to avoid the commission of crimes and misdemeanors during his imprisonment."

The statute provides for "a deduction from the time of (the) sentence for the respective years thereof." This language does not preclude a deduction from each year, or the method of computation contended for by the petitioner. Corresponding to the phrase, "deduction from the time of the sentence," found in our statute, is the expression, "diminution of time from his sentence," found in the Illinois statute (Section 8457, Jones & Addington, 1913). The Illinois statute incorporates within it a table which shows that a credit is not only earned during each year but is also applied to, and deducted from, each year of the sentence. For the first year of the sentence one month of good time is granted and the year is completed by actually serving only eleven months. The table shows that the second year of the sentence is begun immediately at the close of the eleven months period, and, good time of two months being granted for the second year, it is completed in ten months. The Montana statute (Section 9737 Rev. Codes 1907) allows a convict "a credit of time from his sentence." The Iowa statute provides for a "diminution of time from his sentence." Both of the statutes above mentioned include a table which is exactly the same as the Illinois table. All of these tables allow a deduction of six months for the sixth and each succeeding year of the sentence, as does our statute, and show that each of such years is served by an actual confinement of only six months.

In states having good conduct statutes without a table, the method of computation used has usually been that for which the petitioner contends. *In re Fuller*, 34 Nebr. 581, 52 N. W. 577; *In re Walsh*, 87 Mich. 466, 49 N. W. 606; *In re Canfield*, 98 Mich. 644, 57 N. W. 807. *Contra. In re Kness*, 58 Kan. 705, 50 Pac. 939.

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The language of the statute governs the method of computation. 32 Cyc. 333. In our opinion the language of our statute sustains the petitioner's theory as to computation of good time.

The demurrer to the petition is overruled. The writ may issue and the respondent is directed to discharge the petitioner.

MR. JUSTICE SCOTT not participating.

No. 9621.

MIDDLETON v. THE MCCARTHY HIDDEN TREASURE MINING CORPORATION, ET AL.

Decided November 8, 1920.

Action in replevin. Judgment for defendants.

Affirmed.

1. SALES—*Rescission.* Where a seller, who claims fraudulent representations on the part of the buyer, fails to disaffirm the sale when he discovers the alleged fraud, and the rights of innocent third parties intervene, he cannot recover possession of the property by replevin.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. L. J. STARK, Mr. ANDREW H. WOOD, for plaintiff in error.

Messrs. ROGERS, ELLIS & JOHNSON, Mr. PERCY ROBINSON for defendants in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiff in error, as assignee of The Giant Powder Company, brought suit in replevin against The McCarthy

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Hidden Treasure Mining Corporation to recover a quantity of powder which he alleged was obtained from his assignor by false and fraudulent representations by The Hidden Treasure Mines Company. Defendant in error, McClean, intervened as trustee in bankruptcy of the said Hidden Treasure Mines Company. It was alleged that the McCarthy Company obtained the powder with knowledge of the fraud.

It appears that plaintiff in error, as agent of The Giant Powder Company, in August, 1917, sold to The Hidden Treasure Mines Company the powder in question, which was delivered to said company about the middle of September following. Thereupon the said Mines Company gave a chattel mortgage upon said powder to one Whinnery to secure a note of $5,000, executed contemporaneously with the mortgage, which note evidenced an indebtedness of some hundred dollars to Whinnery, and was, in addition, to secure him for advances which he had agreed to make.

It appears from the undisputed testimony that shortly after the giving of said mortgage, the bond and lease, under which the said Mines Company was working mining property in Lake County, Colorado, was forfeited, and soon thereafter defendant in error, The McCarthy Hidden Treasure Mining Corporation was organized to work the same property. It secured from Whinnery an assignment of the note and chattel mortgage upon an agreement with him that it would pay him what the Mines Company owed him, and would carry out his agreement with said company to pay certain overdue labor bills contracted by that company. The McCarthy Company took possession of the powder, and paid the Whinnery debt and the labor bills, amounting in all to something over $6,000.

It appears from the undisputed testimony that when the plaintiff in error discovered what he now says was a fraudulent representation, he took no steps to disaffirm the sale, but on the other hand demanded payment from the manager of the Mines Company, and was assured by him that payment for the powder would be made in a short time. After

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Whinnery had transferred the mortgage to one Thomas, who in turn transferred the mortgage and the powder to The McCarthy Company, plaintiff in error demanded payment of Thomas. In the meantime the vice president and general manager of the Mines Company executed a bill of sale of the powder to Thomas, who transferred the same to The McCarthy Company; that corporation claims ownership and possession of the powder under the chattel mortgage, and under this bill of sale. The district court found that there had been no rescission, the plaintiff in error having delayed too long in disaffirming the sale which was not attempted until the bringing of this suit on February 2nd, 1918. There was no evidence that Thomas or any of the persons interested in the McCarthy corporation had any knowledge of the alleged fraud prior to the purchase of the note and mortgage and the payment therefor. Under that state of facts, the trial court was fully justified in directing a verdict in favor of the defendant, the plaintiff having failed to prove a right to the powder. The judgment is accordingly affirmed.

MR. JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 9662.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. v. THE PEOPLE, EX REL.

Decided November 8, 1920.

Action in mandamus to compel a railway company to construct a bridge over its tracks. Writ granted.

Reversed.

1. APPEAL AND ERROR—*Agreed Statement of Facts.* A question which is excluded by an agreed statement of facts, not determined on review.

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2. Railroads—*Construction of Crossings.* The duty to build railroad crossings on highways, as to those laid out over railroads already constructed, is not imposed by common law. It is strictly one of statutory enactment.

3. Estoppel—*Railroads—Crossings.* A railroad company is not estopped from denying duty to maintain a bridge over its tracks, where the necessary element of estoppel, i. e., change of position by the party alleging it, is wanting.

4. Mandamus—*Lies When.* In an action for mandamus, the duty to be enforced, must be clear and definite.

Error to the District Court of El Paso County, Hon. John W. Sheafor, Judge.

Mr. William V. Hodges, Messrs. Bierbauer & Jackson, for plaintiff in error.

Mr. William C. Robinson, for defendant in error.

En banc.

Mr. Justice Teller delivered the opinion of the court.

The Board of County Commissioners of El Paso County, as relator, obtained a peremptory writ of mandamus requiring the plaintiff in error to construct a bridge across a cut through which its tracks run just north of the limits of the City of Colorado Springs. The case is before us on error.

The cause was submitted upon a statement of facts from which it appears that the railroad was constructed in 1888, and about five years later it voluntarily built a bridge over this cut, at a point which would be within the lines of Tejon Street, if extended northerly from the city limits across the railroad right of way; that no highway has ever been laid out or dedicated at the point in question; that notwithstanding this fact, the bridge has been used by the public for travel across said right of way; that the county constructed a road leading to and from said bridge, and approaches to it, and have kept said roadway in repair and open to the use of the public. It is further stated in said

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statement that the bridge "is no part of any safety device for the safety of persons passing over said railroad and over said right of way."

The right to the mandamus is based by the defendant in error on three grounds: First, that the duty of maintaining the bridge is imposed upon the railroad company by statute. Second, that such duties are imposed by the common law. And third, that the railroad is estopped to deny that such duty rests upon it.

Under the first head, reliance is placed upon the following provision of Section 13 of the Public Utilities act of 1913, which reads as follows:

"(b) Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall in all respects be adequate, efficient, just and reasonable."

Counsel contend that the bridge is a safety device which the above quoted statute requires the plaintiff in error to construct and maintain. The trouble with this contention is that it is excluded by the last paragraph of the agreed statement of facts as above cited. It is not necessary, therefore, to determine whether the statute in question applies to the bridge.

To support the second proposition that the railway company is required by the common law to maintain the bridge, counsel relies upon the case of *State v. St. P. Ry. Co.*, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, and *People v. U. P. Ry Co.*, 20 Colo. 136, 37 Pac. 610. These cases do not support the position. In the Minnesota case it was held that the railway company's charter required it to repair the bridge, and the question of the common law duty did not arise. The Colorado case cited concerned railway crossings of streets laid out before the construction of the railroad. Plaintiff in error does not deny that in that case the railroad company would have to erect and maintain a crossing.

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Counsel cite also the case of *I. C. R. R. Co. v. Willenborg*, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862. In that case the railroad company sought to enjoin a landowner from putting in a crossing. The court held that injunction would not lie because the right of way at that point provided that the landowner should be entitled to crossings, and, in addition, there was a statute which required the railroad company to put in crossings. That the railroad may be required by statute to put in crossings upon highways laid out either before or after the construction of a railroad need not be denied. Here there has been no legislation on the subject. The weight of authority is strongly against the position taken by defendant in error. *Northern Central Ry. Co. v. Baltimore*, 46 Md. 425; *Town of O'Fallon v. O. & M. Ry. Co.*, 45 Ill. App. 572, 579. In the latter case the court said:

"The duty to construct railroad crossings of highways and the approaches thereto, as to highways laid out over railroads already constructed, is not imposed by the common law. It is strictly a duty of statutory enactment, as a police regulation." See also *City of Bloomington v. I. C. R. R. Co.*, 154 Ill. 539, 39 N. E. 478, where the same doctrine is laid down.

In *City of Albia v. C., B. & Q. Ry. Co.*, 102 Ia. 624, 71 N. W. 541, it was held that in the absence of express legislation, a railroad company cannot be required to construct viaducts over its right of way in order to prolong or connect streets or highways established after the location and acquisition of the right of way.

In *L. & N. Co. v. Hopkins County*, 153 Ky. 718, 156 S. W. 379, the court had under consideration a statute requiring railroads to put in street crossings and to restore roads crossed to their former condition. The county was attempting to compel the railroad company to construct an overhead bridge across its right of way. The court said:

"Evidently this statute contemplates the crossing of a highway by the railroad track, at grade, and not an overhead crossing of great expense. * * * There being no

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statutory authority sufficient to authorize the county to exercise its police power to the extent here done, the circuit court was in error, and went beyond the scope of the statute in requiring appellant to construct and maintain an overhead bridge, at its own cost."

To the same effect is the case of *C., H. & D. Ry. Co. v. City of Troy*, 68 Ohio St. 510, 67 N. E. 1051, and *C., M. & St. P. Ry. Co. v. Milwaukee*, 97 Wis. 418, 72 N. W. 1118.

The third position of counsel is that the plaintiff in error is estopped to deny its duty to maintain the bridge, because, it is said, it erected a bridge and permitted the county to grade approaches to it. The necessary element in a case of estoppel, i. e., the change of position by the party alleging the estoppel, is found by counsel in the alleged fact that the building of the bridge induced the county to construct a new public road. This assumes that the county has been damaged by the grading of the approaches to the bridge, making it available as a part of a highway. It does not appear that the county by its action has suffered any damage. It must be supposed that the road was necessary, else the grading would not have been done. The county's right to it is not impaired, and if the bridge is in law to be maintained by the county as a part of the highway—assuming for the purposes of argument that the roadway from the city limits northerly will be made a public highway—the county has lost nothing.

It would appear further that if the county constructed approaches to the bridge at a point where there was no highway, it did so at its own risk. A bridge could not have been built with the reasonable expectation that the county would expend money on approaches to it where there was no highway. Certainly the plaintiff in error obtained no advantage by the construction of a highway which counsel says its action induced.

Counsel further contend that we must infer that there was a contract between the county and the railroad company under which the road was built. It must be remembered that this is an action of mandamus, and the duty to

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be enforced must be clear and definite. Such duty may not be inferred from the existence of such facts as those upon which counsel relies.

There was no duty imposed upon the railroad company to maintain the bridge, and it is not estopped to deny its obligation in that respect. The judgment is accordingly reversed with directions to dismiss the writ.

MR. JUSTICE ALLEN dissents.

MR. JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 9671.

TOMKINS v. SMITH.

Decided November 8, 1920.

Action to enjoin the removal of fences. Judgment for plaintiff.

Affirmed.

1. CONTRACT—*Construction.* Where parties, being the lessees of adjoining lands, entered into an agreement for the construction of fences thereon, provisions of the contract for the specific location of fence lines must prevail over any general purpose stated therein.

2. *Presumptions.* It will be presumed that parties stipulating to build a certain amount of fencing, must have intended that the fences were to stand for a reasonable time.

Error to the District Court of Fremont County, Hon. James L. Cooper, Judge.

Mr. JOHN G. SCHWEIGERT, for plaintiff in error.

Mr. JAMES T. LOCKE, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

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THE parties to this litigation in May, 1917, entered into a contract in writing in order to settle a controversy concerning certain pasture lands, said parties being the lessees of adjoining lands, with no natural dividing line between them. This contract provided for the making of fences, on specified lines, so that, as the contract stated, each of the parties should be restored to the possession of the pasture held by him under lease. The fences were duly made, and about a year thereafter the plaintiff in error, having acquired possession of some adjoining lands, built some new fences, and removed a part of the fence built under the said contract, all of which the defendant in error contends was in violation of the contract, and to his damage. He, therefore, brought suit to enjoin the plaintiff in error from further removing any of the contract fences, and from building any new fences which interfered with the respective possessions as recognized by the contract. The court found for the plaintiff in the suit, and an injunction issued, as prayed in the complaint.

Plaintiff in error contends that the purpose of the contract was to restore each of the parties to the possession of the land leased by him, and that the fences as they stood before the changes made by plaintiff in error did not effectuate the purpose of the contract, inasmuch as it left some of each party's leased lands in the possession of the other. The trial court in its opinion pointed out that the controlling feature of the contract was the specific location of the fence lines to be constructed, and held that such provisions must prevail over any general purpose stated by the contract.

We are of the opinion that the trial court was right in thus holding. He held, further, that it must be presumed that the parties, stipulating each to build a certain amount of fence, must have intended that such fences would stand during the term of their leases. That appears to be a reasonable conclusion; at least it must be presumed that the fences were to stand for a reasonable time, and we think the trial court was right in thus construing the contract.

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That being so, when the plaintiff in error attempted to change the fence lines as established by the contract, and as the fences were built, he violated the terms of his agreement with the defendant in error.

The injunction was, therefore, proper and the judgment of the trial court is affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE DENISON concur.

No. 9712.

WALDO v. STEVENSON, ET AL.

Decided November 8, 1920.

Action on promissory note. Judgment for defendants.

Affirmed.

1. BILLS AND NOTES—*Promissory Note.* A corporation by resolution of the directors authorized the issuance of 300,000 shares of its capital stock to plaintiff Waldo for which he was to and did pay $7500; the company agreeing to undertake to sell enough of the stock to repay the $7500 with interest. Waldo had full knowledge of the resolution and subsequently became a director of the company. Defendants, who were also directors, executed a promissory note merely to guarantee to Waldo that the proceeds of the sale of stock as provided in the resolution, would be paid to him until he had received the $7500 advanced. Ultimately Waldo declined to carry out the agreement contemplated by the resolution and instituted suit on the note. Defendants had no notice that he had withdrawn from the original agreement. *Held*, that defendants were not liable in the action as brought.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

MR. GEORGE F. DUNKLEE, MR. EDWARD V. DUNKLEE, for plaintiff in error.

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Mr. WILLIAM H. GABBERT, Mr. T. L. POLLOCK, for defendants in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error was plaintiff in a suit against defendants in error and one Whitescarver upon a note signed by them all. On the trial evidence was introduced tending to show that The Ajax Wyoming Oil Company, of which the three defendants were directors, had, by resolution of its directors, authorized the issuing of 300,000 shares of the capital stock of said company to Waldo, for which he was to pay $7500, the company agreeing to undertake to sell enough of the stock to net said Waldo the purchase price of $7500, with interest at 6% per annum. The evidence showed that on the day of the adoption of this resolution Mr. Waldo was elected a director of said company, and that, on the following day, he sat with the other directors and heard read the minutes of the meeting of the previous day, including the said resolution. It appears, also, that he read the resolution on that day.

The defendants executed a promissory note for $7500, which is the note in suit, which they contend was merely to guarantee to Waldo that the proceeds of the sale of stock, as provided for in the resolution, would be paid to him until he had received his advance of $7500, and interest. Waldo's check for $7500 was made payable to and was collected by the Oil Company. Waldo testified that, on the advice of his attorney, he declined to execute a contract which had been drawn to carry out the agreement contemplated by the resolution above mentioned. There is no evidence, however, that he ever informed either Stevenson or Greenlee that he had withdrawn from the original agreement. Nor is there any evidence that they knew of such change in plan. On the other hand, there was in evidence an exhibit, of the same date as the note, signed by Waldo, which authorized the Oil Company to sell a part of the 300,000 shares of stock, and to apply the proceeds in

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payment of the note; all as provided for in the resolution. The trial court directed a verdict for Stevenson and Greenlee.

We are of the opinion that the evidence is conclusive that Stevenson and Greenlee signed the note in question, as the court found, under the assumption that it was made in pursuance of the resolution named, and for the purpose above stated. That being so, the court was right in holding that they were not liable in the action as brought.

The judgment must, therefore, be affirmed, and it is so ordered.

MR. JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 9787.

CHICAGO, BURLINGTON & QUINCY RAILROAD CO. v. THE PUBLIC UTILITIES COMMISSION OF COLORADO ET AL.

Decided November 8, 1920.

Proceedings to review an order of the utilities commission directing the opening of a street across a railroad right of way.

Order Vacated.

1. PUBLIC UTILITIES COMMISSION—*Powers—Police Power and Right of Eminent Domain Distinguished.* A railroad crossing may be ordered put in under the police power of the state; but land may be taken for a street only by the exercise of the right of eminent domain.

2. EMINENT DOMAIN—*Compensation.* Not only does the constitution guarantee the right of a person, whose property is taken for public use, to receive compensation therefor, but the right exists regardless of constitutional provisions.

3. PUBLIC UTILITIES COMMISSION—*Powers.* The public utilities commission is without authority to order the opening of a street across a railroad right of way.

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Writ of Review to the Public Utilities Commission.

Mr. E. E. WHITTED, Mr. J. L. RICE, for petitioner.

Messrs. COEN & SAUTER, for respondents.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

THE question for determination in this case is as to the right of The Public Utilities Commission, by an order, without any proceeding in condemnation, to open a street across a railroad right of way.

The argument of counsel for the respondent is, in brief, as follows:

The state has delegated to the Commission a part of the police power, that is, the right to regulate railroad companies in various matters, including the putting in of street crossings, etc.

That being so, the order to put in a crossing is within the authority of the Commission, and the order should be affirmed.

The defect in this argument is due to a failure to distinguish between the police power, and the right of eminent domain; between the power to compel the installation of crossings, and the power to take land for streets, or other public purposes.

A crossing may be ordered put in under the police power of the state; land may be taken for a street only by the exercise of the right of eminent domain.

Throughout the brief for respondent, this misapprehension appears. Cases are cited to the effect that crossings may be ordered in, at the expense of railroad companies, and that uncompensated obedience to a regulation, enacted for the public safety under the police power of the state, is not a taking of private property without just compensation; with all of which we agree. Those cases have, however, no bearing on the question at issue. Indeed, the Commission seems to have first fallen into this error of supposing that the power to require the construction of

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crossings was equivalent to the power to take land for a roadway across the tracks. The Commission's "Statement," preliminary to the order, discusses the necessity for a street across the tracks, and then orders the removal of the platform, and the installing of a crossing. It is apparently assumed that the order opened the street, as well as required the putting in of a crossing.

It is no where claimed that the Commission has the right of eminent domain; the contention is based entirely upon the assumption that the order, being valid as an exercise of police power, operated to open the street.

The distinction between the two powers above mentioned is universally recognized.

In 12 C. J. at page 905, it is said:

"The police power is to be clearly distinguished from the right of eminent domain; and the distinction lies in this, that in the exercise of the latter right private property is taken for public use and the owner is invariably entitled to compensation therefor, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare of the public, and in neither case is the owner entitled to any compensation for any injury which he may sustain in consequence thereof, for the law considers that either the injury is *damnum absque injuria* or the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police power."

In *Lewis v. Eminent Domain* (2nd ed.), Sec. 6, the police power is said to be clearly distinguishable from the right of eminent domain. The author says:

"Under the one, the public welfare is prompted by regulating and restricting the use and enjoyment of property by the owner; under the other, the public welfare is promoted by taking the property from the owner and appropriating it to some particular use."

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In 10 R. C. L. p. 7, in discussing the distinction between police power and eminent domain, it is said:

"The real distinction however lies in the fact that in eminent domain property or a right in property is taken from the owner and transferred to a public agency to be enjoyed by it as its own, whereas the police power, although it may and often does take property in the constitutional sense so that it must be paid for, yet this is not accomplished by a transfer of ownership, but by destroying the property or impairing its value."

It is manifest, then, that the discussion of the police power is wholly beside the mark. No case is cited, and we find none, which supports the contention of counsel.

On the other hand, there are many cases which recognize the necessity for a proceeding in condemnation to open a road across a railroad right of way.

In 24 L. R. A. (N. S.), in a note at page 1214, it is said:

"General power to lay out, extend, and open streets, when authority to condemn property is also conferred, will permit the opening of a street across a railway right of way."

To this note are cited cases from Georgia, Illinois, Minnesota, Missouri, Ohio, New York, Connecticut, Indiana, South Dakota and New Jersey.

On page 1226 of the same volume, in a note, it is said:

"As an easement in a railway right of way is property within a constitutional inhibition against taking or damaging private property for public use without compensation, it is generally held that a street or highway cannot be laid out or established across it without making compensation therefor."

To this note are cited cases from Arkansas, Connecticut, Georgia, Illinois, United States Supreme Court, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Missouri, Nebraska, New Jersey and Pennsylvania. The note also points out that

"Notwithstanding a railway company must be compensated for the laying out of a street across its right of way,

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yet the expense of constructing the crossing and its approaches may be lawfully imposed upon it."

The distinction is that the taking is under the right of eminent domain, while the regulating as to crossings and approaches is under the police power of this state.

In 15 Cyc. 669, it is said:

"A railroad company is entitled to compensation for the location of a public highway over or across its right of way."

In support of this text cases are cited from Illinois, Kansas, Massachusetts, New Jersey, Ohio and Pennsylvania.

The right of a person or corporation, whose property is taken for public use, to compensation therefor is guaranteed by both the state and the federal constitution. Such right, however, exists regardless of constitutional provisions. It is a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation is an incident to the exercise of the power of eminent domain. *C. B. & Q. R. Co. v. Chicago,* 166 U. S. 226.

The fact that property may be damaged or destroyed, without compensation, under the police power, has no bearing upon this controversy. Here the property is to be *taken,* and devoted to a public use, the railroad company retaining a right to its use, qualified by the right of the public to a new use. Property consists not in the thing said to be owned, but in the right to dominion over it, control of its use, and disposition. The thing owned may be tangible or intangible, a fee in land or an easement in it. A railroad company across whose tracks a street is opened loses the exclusive control,—which is property,—over the part devoted to street purposes, and hence a part of its property is "taken." Its right to compensation for that part is a natural right, protected by express constitutional provisions. Such is the declaration of the United States Supreme Court in the case last cited.

There is, moreover, no reason for giving to the Commission the right to condemn.

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Paragraph 59 of Section 6525, R. S., 1908, gives express power to town and city councils to extend streets across railroads.

Paragraph 74 of said section provides that when it shall be deemed necessary by any municipal corporation to enter upon or take private property for any of the uses theretofore named, which includes street purposes, the same shall be examined, appraised and the damages thereon assessed, and the proceedings in connection therewith shall be in all respects the same as is now or may hereafter be provided by general law for the taking of private property for public or private use.

This shows that the legislature recognized that in carrying out the powers given by paragraph 59 the right of eminent domain was necessary to be granted, or at least that it was advisable to grant it. Doubtless, under the authorities, the right given in a previous paragraph of that section to extend and open streets would have given the right to cross railways by condemnation, but the matter is made clear by the paragraph in question.

If the citizens of Peetz want the street extended, they can doubtless induce the town council to take appropriate action to that end. This local action better accords with the principles of popular government, than does the committing of the matter to the determination of a state commission.

In every view of the case the conclusion is irresistible that the Commission did not regularly pursue its authority, and hence its order is invalid. The Commission is therefore directed to vacate the order.

MR. JUSTICE SCOTT and MR. JUSTICE ALLEN dissent.

MR. JUSTICE BAILEY not participating.

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No. 9933.

ROMEO v. DOWNER AS MANAGER OF SAFETY, ETC., ET AL.

Decided November 8, 1920.

Application for writ of habeas corpus.

Writ Denied.

1. CRIMINAL LAW—*Right to Bail After Conviction and Before Sentence.* Section 19 of the Bill of Rights, relating to bail, does not give a defendant an absolute right to bail after conviction and before sentence, this being a matter within the discretion of the trial court.

Original Proceeding.

Mr. B. F. REED, Mr. ROBERT W. STEELE, JR., Mr. CLARENCE M. HAWKINS, for petitioner.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES ROACH, deputy, Mr. B. M. MCMULLIN, assistant, for respondents.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

THE petitioner has applied to this court for an original writ of *habeas corpus*, alleging that one Angelo F. Romeo is in jail, and restrained of his liberty in violation of his right to bail, which is guaranteed by Section 19 of the Bill of Rights. Said section is as follows:

"That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."

The said Angelo Romeo was convicted by a jury of the second judicial district of voluntary manslaughter; and upon the return of the verdict, he was given in charge to the said defendant in error, who confined him in the county jail. Thereafter, application was made to the district court to admit the accused to bail pending the determina-

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tion of a motion for a new trial. The court denied the application upon the ground that it was a rule in the second district that, after verdict and pending a motion for a new trial, the defendant would not be admitted to bail.

The petitioner contends that under said section of the Bill of Rights, the petitioner is bailable as a matter of right until sentenced. It does not appear that this question has been determined by this court. There is considerable conflict of authority upon the question of bail after conviction and prior to sentence. Several states have statutes on the question. The weight of authority, however, supports the rule that constitutional provisions, like that now in question, do not give a defendant an absolute right to bail; but that it is a matter of discretion with the trial court. We are of the opinion that the cases thus holding have given a proper construction to the language of the constitution. The petitioner therefore has no right to the writ and the petition will be denied. Accused persons bailable before trial, having no absolute right to be admitted to bail after conviction should be admitted to bail "with great caution and only where the extraordinary or peculiar circumstances of the case render it right and proper." 6 C. J. p. 966. The burden of showing such circumstances is, of course, on the accused.

Writ denied.

No. 9570.

THOMAS v. THOMAS.

Decided April 5, 1920. Rehearing denied December 6, 1920.

Action to recover corporate stock issued through a mistake. Judgment for plaintiff.

Affirmed.

1. PLEADING—*Complaint.* An allegation in a complaint that plaintiff

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by mistake and error issued to the defendant 556 shares more than she was entitled to, and issued to himself 556 shares less than he was entitled to, held sufficient to constitute a cause of action.

2. APPEAL AND ERROR—*Sufficiency of Evidence.* Evidence reviewed and held sufficient to support a decree for plaintiff.

3. LIMITATIONS—*Fraud and Mistake.* Whatever statute of limitations applies to a case of fraud or mistake, it does not begin to run in equity, until after the discovery of the fraud or mistake.

Error to the District Court of the City and County of Denver, Hon. Henry J. Hersey, Judge.

Mr. EDWIN W. HURLBUT, Mr. THORNTON H. THOMAS, for plaintiff in error.

Mr. GEORGE C. MANLY, for defendant in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THEODORE H. Thomas, plaintiff below, brought suit against Lizzie M. Thomas, his sister-in-law, alleging that in a certain division of stock in the Quintet Mining Company between the plaintiff, his brother, Thornton H. Thomas, and the defendant, made on February 28th, 1912, the defendant had by mistake received 556 shares too much.

The court found for the plaintiff and decreed the return of the shares and the payment of certain dividends, which in the meantime had been received thereon, and the defendant brings error.

First: The first point made by the plaintiff in error is that the complaint does not state facts sufficient to constitute a cause of action.

We think this complaint is sufficient. The objection is that the allegation, "he by mistake and error issued to the defendant 556 shares * * * more than she was entitled to and issued to himself 556 shares * * * less than he was entitled to" is insufficient, because it does not state in detail the amount of stock which was issued to each, and

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why it was more or less than the parties were entitled to.

Whether this pleading would justify a motion to make it more definite and certain, we do not determine; but, as it stands, it is sufficient to constitute a cause of action.

Second. The plaintiff in error says that the evidence does not justify the finding of the court. Upon this point we might say that since there was evidence for and against the proposition of the mistake, we would not disturb the court's finding; but, in view of the relation of this case to No. 9587 between the same parties, we will say that we think the evidence does justify the court's decision. The brothers had been on most intimate terms and in their financial transactions were as one. In November, 1901, they owned between them, in certificates of different amounts, 76,270 shares in The Creede Quintet Mining Company. A small amount of this belonged to the wife of the plaintiff, but for the purposes of this statement we will treat it as his.

In November, 1901, the two brothers entered into an agreement in writing, shown in the record, which contained a schedule of all the property which they held jointly, and that schedule included 50,633 shares of this stock and no more; and the agreement provided that all property thereafter acquired by them should be held separately. The inference is absolute that the remainder of the 76,270 shares was not held jointly.

In February, 1912, a new company was formed to take the property of the old company, the charter of which was expiring, and the old stock was made exchangeable for the new stock at ten for one. The plaintiff, who was secretary of both, divided all the stock evenly, half and half, and issued the stock in the new company accordingly, when, according to its ownership and the agreement of the parties, he should have divided the 50,633 shares evenly and issued new stock accordingly and then issued to each stockholder stock in the new company according to his respective individual holding in the old.

By this mistake it was shown that the defendant, to

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whom her husband requested the new stock should be issued, received 556 shares more than she ought and the plaintiff 556 shares less than he ought. There was some slight variation in these amounts which it is not necessary to consider here and the court gave judgment for 536 instead of 556 shares, which judgment we will not disturb.

Third. It is pleaded that the alleged mistake was not made within six years prior to the beginning of the suit. The plaintiff replied that he did not discover the mistake until December, 1917. It is claimed that this reply is insufficient. The complaint was filed on the 6th of December, 1918, more than six years after the mistake was made.

The replication is good. The answer to the question does not rest upon the statute limiting bills for relief on the ground of fraud. Without such statute it is a rule of equity that whatever statute of limitation applies to a case of fraud or mistake it does not begin to run until the discovery of the fraud or mistake.

On this point see *Gould v. Emerson*, 160 Mass. 438, 35 N. E. 1065, 39 Am. State, 501; *Emerson v. Navarro*, 31 Tex. 334, 98 Am. Dec. 534, 538; *Ainsfield v. More*, 30 Neb. 385, 403, 46 N. W. 828, and other cases cited in 33 Cent. Dig. Title "Lim. of Actions," § 476.

Judgment affirmed.

No. 9627.

HEDGES v. MITCHELL.

Decided December 6, 1920.

Action by passenger against the driver of an automobile for damages. Judgment for plaintiff.

Affirmed.

1. MUNICIPAL CORPORATIONS—*Regulation of Park Driveways.* In the absence of special regulations by a municipal department of

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improvements and parks, controlling traffic on park driveways, the general ordinances of the city will govern.

2. *Park Management.* In the management and control of parks, a department of the city government is administrative and not governmental.

3. NEGLIGENCE—*Violation of City Ordinance.* The violation of a city ordinance is negligence *per se.*

4. *Contributory Negligence.* It is not the duty of a passenger on the rear seat of an automobile to warn and guide the driver as to his route of travel, speed, etc., and his failure to do so does not constitute contributory negligence.

5. EVIDENCE—*Presumptions—Instructions.* The court will not take judicial notice of the existence of a foot rail in an automobile so constructed as to permit passengers to entangle their legs therein, and where there is no sufficient proof on the subject, a specific instruction relating thereto is not required.

6. VEHICLES—*Rules of the Road.* A municipal ordinance requiring all vehicles on a circular roadway to drive to the right on entering, constitutes such roadway a "one way street." On such a street, the rule requiring vehicles to drive on the right of the center is inapplicable.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Messrs. GILLETTE & CLARK, for plaintiff in error.

Mr. L. F. TWITCHELL, Mr. H. R. KAUS, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in Error was Defendant and Defendant in Error was Plaintiff in the District Court and they are hereinafter so designated.

Plaintiff brought this action against defendant for damages for personal injuries sustained by him in an automobile collision while he was riding as a guest in defendant's car. On a verdict for plaintiff in the sum of $5000, judg-

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ment was entered and defendant brings the cause here for review.

Near the West entrance to the City Park in the City of Denver is a certain group of bronze figures referred to in the pleadings and briefs as "The Thatcher Monument." Entirely encircling this monument is a 93 foot driveway. 18th Avenue enters this driveway from the West and on the East side passes on through the park. Another Avenue known as "The Esplanade Entrance" intersects this circular driveway from the South. Defendant drove his car down the Esplanade entrance, turned to the left about the circular driveway, and on the right hand side thereof, out toward 18th Avenue, and there collided with an automobile belonging to James C. Burger, hereinafter referred to as "The Burger Car." The collision, the manner of it, and the resulting injuries to plaintiff, are undisputed. Plaintiff alleges that those injuries were caused by the negligence of defendant; first, in turning from the Esplanade entrance to the left, instead of passing to the right around the Thatcher monument; second, in driving at an excessive rate of speed. Defendant denied having driven at an excessive rate of speed, and denied any obligation imposed by ordinance, or otherwise, to keep to the right around the monument. He further contends that the injuries complained of were caused, or contributed to, by plaintiff's own negligence in that, first; having full knowledge, or being chargeable therewith, he neglected to protest the alleged negligence of defendant; second, that he carelessly caught his leg, or foot, in or on the foot-rest of the car, and by reason thereof was unable to protect himself when the collision occurred. As a further defense it is alleged that the collision was due to the negligence of the driver of the Burger car in failing to keep to the right on the circular driveway.

BURKE, J., after stating the facts above.

We have here presented for our consideration four questions. First:—Was defendant guilty of negligence in pass-

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ing to the left instead of the right around the circular driveway? Second:—Was plaintiff guilty of contributory negligence in failing to protest the alleged negligence of defendant? Third:—Was plaintiff guilty of contributory negligence in becoming entangled in the foot-rest of defendant's car? Fourth:—Was the collision due to the negligence of the driver of the Burger car in being on the left of the center of the circular driveway?

1. Article III, Sec. 14 of the Denver City Charter (offered in evidence by defendant and excluded) provides:

"There shall be and is hereby created a Department of Improvements and Parks which shall have * * * full charge and control of all parks within or without the City, and parkways leading to or from said parks, heretofore under the control of The Park Board."

Under the authority of this provision the department thereby created has made no special regulations of traffic on such roadways as the one in question. Our attention has been directed to no authority holding that such failure would preclude the municipality itself from making such regulations. In the absence of any such enactment by the department the general ordinances control. *People v. Lloyd*, 178 Ill. App. 66, 71.

In the management and control of parks a department of the city government is administrative, not governmental. *City and County of Denver v. Bowen et al.*, 67 Colo. 315, 184 Pac. 357, 359.

The article in question did not therefore preclude legislation on the subject by the municipality. It was immaterial under the circumstances and properly excluded.

Sec. 2012 of the City Ordinances (introduced in evidence over the objection of defendant) provides:—

"A vehicle passing around a circular roadway shall keep to the right from the entrance or exit."

For the reason above stated this ordinance was controlling and its admission was proper. Defendant was admittedly violating it. Such violation was negligence *per se*. *Denver & R. G. R. R. v. Ryan*, 17 Colo. 98, 28 Pac. 79; *Den-*

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ver O. & C. Co. v. Mills, 21 Colo. App. 582, 588, 122 Pac. 799. There can be no doubt under the evidence that such negligence was the proximate cause of plaintiff's injuries.

2. It is contended that some duty devolved upon plaintiff (a passenger on the rear seat of defendant's automobile) to warn and guide defendant as to his route of travel, his speed, etc., and that neglect to discharge that duty constituted such contributory negligence as to defeat recovery. If such be the law the instructions given were ample. But a duty to give such advice implies a duty to heed it and the rear seat driver is responsible for enough accidents as the score stands without the aid of judicial precedent. The place for a passenger who knows better than the driver of a car when, where and how it should be operated is at the wheel.

3. What has been said of the instructions on contributory negligence as applied to plaintiff's failure to caution and direct defendant is true also of the contention that plaintiff permitted his foot or leg to become "entangled" in the foot-rail. Moreover, while the use of automobiles is so universal that there are doubtless certain matters of common knowledge relating thereto which courts will notice judicially, the existence of foot-rails so constructed as to permit passengers to entangle their legs therein is not one of them; and there being no sufficient proof on the subject it required no specific instruction.

4. The ordinance requiring all vehicles on a circular roadway to drive to the right constitutes such roadway a "one way street." On such a street the rule requiring vehicles to drive on the right of the center is inapplicable. All are presumably traveling in the same direction. Every vehicle passing another must pass to the left. Those traveling slowly would of necessity be on the right. Since defendant contends that the Burger car was exceeding the speed limit its proper place on the roadway was to the extreme left. It is further contended that the excessive speed of the Burger car was the proximate cause of the accident. Whether that car was, or was not, being driven at an exces-

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sive rate of speed the contention is disposed of by the fact that a Ford automobile, immediately preceding the car of defendant, first encountered the Burger car and had no difficulty in avoiding a collision.

Other alleged errors require no examination. The judgment is affirmed.

MR. JUSTICE SCOTT not participating.

No. 9666.

BOARD OF COUNTY COMMISSIONERS OF LOGAN COUNTY v. ADLER.

Decided December 6, 1920.

Action against a county for damages resulting from the construction of a bridge. Judgment for plaintiff.

Affirmed.

1. COUNTY—*Liability for Tort of Agent.* A county is not liable for the torts of its agents in the absence of an express statute making it liable.

2. DAMAGES—*Liability of County—Action.* One whose property is damaged by the construction of a public improvement by a county may bring an action for damages therefor, and this is true where the improvement is constructed without condemnation proceedings.

   In this respect he is not limited to the cases in which he had a right of action at common law; but may sue for damages suffered, though there is no question of negligence involved.

Error to the District Court of Logan County, Hon. L. C. Stephenson, Judge.

Messrs. MUNSON & MUNSON, for plaintiff in error.

Messrs. COEN & SAUTER, for defendant in error.

En banc.

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MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error in constructing a bridge across the Platte River filled up certain of its channels, thereby causing the water in time of flood to back up and overflow lands of the defendant in error. He brought suit to recover damages for the injury caused by such overflow.

A demurrer to the complaint having been overruled, and answer filed, the cause went to trial, and plaintiff had judgment.

Plaintiff in error now contends that the court erred in not sustaining the demurrer to the complaint, and in entering judgment on a verdict for plaintiff, because: First, the county is not liable for a tort; and second, plaintiff cannot recover under Section 15 of Article II of our Constitution, because this court has held that it applies only to proceedings under the eminent domain act.

Counsel for the defendant in error concede that a county is not liable for the torts of its agents, in the absence of an express statute making it liable; *County Commissioners v. Bish,* 18 Colo. 474, 33 Pac. 184. They have abandoned the charge of negligence, as not necessary to the cause of action; and maintain that an action lies, under said constitutional provision, for the damages suffered, regardless of the question of negligence in the construction of the improvement. They contend further that this provision constitutes express authority for an action against a county under the facts of this case.

It being a prerogative of the state to be exempt from coercion by suit, a provision of the fundamental law for compensation in case of damage, which is applicable to injuries caused by instrumentalities of the state, or by its agents, and to no other injuries, must be held to except such cases from the exemption. If this be not so, the plain intent of the inhibition is limited, and made, to a considerable extent, ineffective.

On principle this objection would apply to actions to recover for injury by the construction of railroads, or changes of street grades, because, in either case, the authority to

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take private property for the improvement is derived either directly or indirectly from the state. Whether exercised by a city, a county or a railroad company, the right of eminent domain is exercised under power delegated by the state.

The purpose of such provisions is, as the courts have many times declared, to prevent a property owner from being made to suffer an uncompensated injury, not common to the public, as a result of the construction of a public improvement. Such improvements are frequently made or authorized by counties; and to say that because of that fact damages so suffered cannot be recovered is to deny to the language of the constitution its obvious import.

This construction, however, in no way changes the rule that a county, as a subdivision of the state, is not ordinarily liable for the torts of its agents. That rule is always subject to the qualification that a county may be made liable by law. Section 15 of Article II of our Constitution is a consent by the state to the bringing of suits against a county under such circumstances as are disclosed in this case.

The second objection is that a right of recovery claimed under the constitutional provisions mentioned, does not exist, because of our decision in *North Sterling District v. Dickman*, 59 Colo. 169, 149 Pac. 97, Ann. Cas. 1916D, 973. The plaintiff there asserted the right under said provision to recover for injuries resulting from seepage; but this court held that the provision "refers, and is limited to proceedings in eminent domain, or to cases where injury results by reason of the taking of property in which the abutting owner has an interest. Its purpose was to require compensation to be paid the owner of land taken in such cases not only for the land actually taken, but for damages to the residue."

It is to be observed that although in the Dickman case the damages alleged were claimed because of seepage upon land no part of which had been taken in condemnation proceedings, the statement in the opinion refers only to damages to the *residue* of lands taken. This would seem to

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limit the protection afforded by the constitutional provision to property directly concerned in condemnation proceedings.

If the rule announced in that case is to be applied to the determination of this case, defendant in error had no right of action. There was no condemnation proceeding, and if there had been he would not have been a party to it.

The importance of this question justifies, in the mind of the court, a re-examination of the subject, a determination of the scope of the provision, and of the proper construction to be given to the term "damaged," as there used.

As is well known, constitutional provisions prohibiting the taking of private property for public use without compensation, have been included in practically all of the state constitutions. Where a part of a property was taken, and the residue suffered a direct physical damage as a result of the taking, such damage was held by many courts to be a "taking," within the meaning of the constitutional provisions like that above mentioned. This court so held in *Denver v. Bayer*, 7 Colo. 120, 2 Pac. 6. But this left a property-owner who sustained merely consequential damages from a public improvement, without remedy. The injustice of this result was generally recognized.

In 1870 the Illinois constitution was amended so as to prohibit both the taking and the damaging of private property for public use without compensation. The propriety of the change made in the Illinois constitution has been recognized by amendments to nearly all the state constitutions; and doubtless the framers of our constitution adopted the language under consideration from the constitution of Illinois.

This section applies to proceedings in eminent domain, and to situations in which such proceedings would be proper; i. e., where condemnation would be necessary were the required property not otherwise acquired.

The use of the word "damaged" in this section in connection with the word "taken" indicates clearly that the damage contemplated was such as would result from the making of an improvement in which the right of eminent

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domain might be called into use.

The first sentence directly and specifically inhibits the taking or damaging of private property for public or private use without just compensation. It is in no wise limited by the following provisions which prescribe the *procedure* in the appropriation of private property to a public use. The inhibition applies wherever condemnation proceedings, are or might be necessary, or proper, whether such proceeding is instituted or not. The provision being thus limited, it may be held, as has been done in many jurisdictions, that the right of recovery under such a constitutional provision is not limited to actions maintainable at common law.. This construction obviates the possible objection, suggested by Judge Helm in *Denver C. R. Co. v. Nestor,* 10 Colo. 403, 15 Pac. 714, that if actions for compensation were not limited to those maintainable at common law, a landowner might be liable to an adjoining lot-owner for "incidental injuries occasioned by a prudent exercise of his right of dominion."

The full purpose of the provision cannot be effected if the rule announced in the Dickman case is to prevail. Under that rule, where condemnation proceedings are instituted in the making of a public improvement, a property owner, no part of whose property was taken, and who was not, therefore, a party to the proceedings, would be without remedy, save in a case of negligence, no matter how greatly his property might be damaged by the improvement.

Under that rule if a part of a property is taken the owner may recover the value of what is taken, and such damages to the residue as result from the taking; but one whose property does not abut upon the improvement, although damaged, is without remedy, because he has no right to begin condemnation proceedings. It is so held in *Stetson v. C. & E. R. Co.,* 75 Ill. 74. However, such an owner is not in fact without remedy; he may bring his action for damages. *Rigney v. Chicago,* 102 Ill. 64; *G. R. & I. R. Co. v. Heisel,* 47 Mich. 393, 11 N. W. 212; *Gulf, C. & S. F. R. Co. v. Fuller,* 63 Tex. 467; *Gottschalk v. C., B. & Q.*

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R. Co., 14 Neb. 550, 16 N. W. 475, 17 N. W. 120; *Penna. R. R. Co. v. Miller*, 132 U. S. 75, 10 Sup. Ct. 34, 33 L. Ed. 267; *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *Atlanta v. Green*, 67 Ga. 386; *St. Louis v. St. Louis Ry. Co.*, 272 Mo. 80, 197 S. W. 107; *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6; *Jackson v. Kiel*, 13 Colo. 378, 22 Pac. 504, 6 L. R. A. 254, 16 Am. St. Rep. 207; *Pueblo v. Strait*, 20 Colo. 13, 36 Pac. 789, 24 L. R. A. 392, 46 Am. St. Rep. 273; 20 C. J. 672-739. And this is true where a public improvement is constructed without condemnation proceedings. *City of Elgin v. Eaton*, 83 Ill. 535. In this respect he is not limited to the cases in which he had a right of action at common law; but may sue for damages suffered, though there be no negligence in the making of the improvement in question. *Denver C. R. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714; *Reardon v. San Francisco*, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109; *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638; *White v. W. S. R. Co.*, 154 Ill. 620, 39 N. E. 270; *Aldis v. Railroad Co.*, 203 Ill. 567, 68 N. E. 95. The latter case holds that in an action by a property owner for damages, the measure of damages and the rules of evidence are the same as in a direct proceeding by condemnation.

All these cases, including those from this court, are in direct conflict with the holding in the Dickman case, in which, it may be noted, there is no authority cited in support of the ruling under consideration. *Denver v. Bayer, supra*, is cited, as to the purpose of the constitutional provision, the fact being apparently overlooked that the case is directly in conflict with the court's subsequent statement that said provision applies only to proceedings in eminent domain.

If the case is to stand, the frequently exercised right of recovery for damages in the making of public improvements, such as viaducts and bridges, the changing of street grades, etc., where damages are not assessed in eminent domain proceedings, or where the improvement is made

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without such proceedings, no longer exists in this jurisdiction.

In the case at bar, though the injuries are consequential, they are to the *corpus* of the plaintiff's property. No question is made but that the injury resulted from the placing of the bridge embankments as they are.

Upon a full view of the case, we are constrained to hold that the limitation in the Dickman case to damages such as might be recovered in eminent domain proceedings was without justification. We, therefore, hold that the rule there announced does not properly construe the constitutional provision in question, and it cannot defeat plaintiff's right of recovery. The demurrer to the complaint was properly overruled, and there was no error in the entering of judgment on the verdict. The judgment is accordingly affirmed.

No. 9703.

KOBEY v. GOTTSTEIN.

Decided December 6, 1920.

On motion to dismiss writ of error.

Writ dismissed.

1. APPEAL AND ERROR—*Motion for New Trial—Writ of Error.* Motion for new trial was overruled July 23, 1917 and judgment regularly entered. The record contained an order of date October 8, 1917, denying a motion for new trial, but containing nothing to show why this order was entered after the final disposition of the case. *Held*, that the latter order had no effect in extending the time for suing out a writ of error.

2. *Record—Letters of Clerk of Court.* Unauthenticated letters of the clerk of a court to an attorney, which are not made part of the record, cannot be filed in the court of review.

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Error to the District Court of the City and County of Denver, Hon. John A. Perry, Judge.

Mr. HARRIS KOBEY, Pro se.

Mr. FLOYD J. WILSON, Mr. CHARLES ROACH, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error obtained judgment against plaintiff in error on a promissory note. Motion for a new trial having been overruled on the 23rd day of July, 1917, judgment was regularly entered upon that day. Defendant in error moves for a dismissal of the writ of error upon the ground that it was not sued out until October 6, 1919. Plaintiff in error depends upon the fact that the record contains an order dated on the 8th day of October, 1917, denying a motion for a new trial. As the record contains nothing to show why this order was entered after the final disposition of the case, it can have no effect in extending the time for suing out a writ of error.

Plaintiff in error tenders for filing copies of certain letters of the clerk of court to plaintiff in error's attorney stating the trial court had sustained a motion to set aside the order denying motion for a new trial, and setting the motion for new trial for hearing October 8, 1917, and that the same was on that day denied. This matter cannot be filed because it is not authenticated, and forms no part of the record of the court. The motion to dismiss the writ is sustained. It may be said further, that an examination of the record discloses no error in the proceedings, and that judgment was undoubtedly right.

Writ of error dismissed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE DENISON concur.

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No. 9918.

ROGERS v. BRUCE.

Decided December 6, 1920.

Action to enjoin the enforcement of a justice of the peace judgment. Judgment of dismissal.

Affirmed.

On Application for Supersedeas.

1. JUDGMENT—*Injunction Against the Enforcement of.* In order to enjoin the enforcement of a judgment at law on the ground that it is unconscionable and inequitable, the complaining party must show facts which prove it to be against conscience to execute such judgment and of which he could not have availed himself at law, but was prevented by fraud or accident, unmixed with any fraud or negligence in himself or his agents.

2. EQUITY. In equity, no man can take advantage of his own wrong.

Error to the District Court of San Miguel County, Hon. Thomas J. Black, Judge.

Mr. E. B. ADAMS, Mr. WILLIAM H. GABBERT, for plaintiff in error.

Messrs. MOYNIHAN, HUGHES, KNOUS & FAUBER, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

DEFENDANT in error, Bruce, brought unlawful detainer against Plaintiff in Error, Rogers, in justice court. The premises in question were a portion of the unsurveyed public domain. Service was had, Rogers defaulted, and, on proof, judgment was entered for Bruce. Rogers appealed to the county court. The appeal was dismissed and writ of procedendo was issued to the justice. Writ of restitution was issued out of the justice court and served on Rogers. Disregarding the mandate thereof, he brought this action

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against Bruce in the district court to enjoin the enforcement of the justice judgment. His petition was dismissed by the district court and he brings the cause here for review on error. It is now before us on his application for supersedeas.

BURKE, J., after stating the facts as above.

The complaint contains no allegation of fraud, deceit, or mistake. In it Rogers makes no explanation of his failure to defend in the justice court, and makes no attack upon the judgment there entered. The injunction is sought solely upon the ground that to permit the enforcement of that judgment would be unconscionable and inequitable. If so what, if anything, must the aggrieved party do to entitle him to relief?

"Any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment."

Fisher v. Greene, 5 Colo. 541, 560. (Quoting 2 Story Eq. Jur. Sec. 887).

"Courts of equity will seldom interfere to enjoin a judgment at law where the defendant was served and allowed a judgment by default."

Richardson Drug Co. et al v. Dunagan, 8 Colo. App. 308, 319; 46 Pac. 227, 232.

It is here urged on behalf of Rogers that something happened subsequent to the judgment which destroyed its force, whereby it ceases to be effective, and the relief prayed for should be granted. The only evidence to support this position is the fact that Bruce failed to do those things required by Sec. 5130, R. S. 1908, in reference to his claim to the property in question, at a time when Rogers was, either by open defiance of a valid judgment, or by litigation which tied the hands of Bruce, maintaining that

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possession which had been adjudicated illegal. Such failure was not due to "neglect" but to a commendable consideration for the law and its orderly enforcement. In equity no man can take advantage of his own wrong.

The supersedeas is denied and the judgment affirmed.

No. 9955.

LANDIS v. HEWITT.

Decided December 6, 1920.

Action in forcible detainer. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

1. APPEAL AND ERROR—*Pleading—Evidence.* Where there is insufficient testimony to sustain the defenses pleaded, and the evidence supports the judgment, it will be affirmed.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. PHILIP HORNBEIN, for plaintiff in error.

Messrs. PERSHING, NYE, FRY & TALLMADGE, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

THE defendant in error was plaintiff below in an action in forcible detainer. The complaint alleged ownership of the property in question, a lease to the plaintiff in error for a term which expired in 1919, but which was found by judgment of the court in a proceeding tried in 1919 to have been extended to September 1, 1920.

Plaintiff alleged also the service of various notices upon the defendant to vacate the premises on said September 1st,

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a written demand upon him on September 2, 1920, and his refusal to vacate.

The answer in one defense alleged defendant was in possession of the premises under a tenancy from year to year, and a separate defense alleged that he was in possession of the premises under an agreement with the plaintiff that the defendant might remain in possession pending certain negotiations for the sale of his stock; that he obtained a purchaser, but that the plaintiff's demand for rent was so exorbitant that the purchaser declined to purchase, and the negotiations were terminated.

Upon the trial the defendant made certain offers of testimony which, on objection, were rejected.

There appears to have been no attempt to sustain the defense of a tenancy from year to year, and the testimony offered in support of the other defense is wholly insufficient to show an agreement for an extension of the lease.

It is undisputed that notices were served upon defendant by the plaintiff monthly for several months prior to the expiration of the lease, stating that possession would be demanded on September 1st, and that the demand was made.

The verdict in favor of the plaintiff is fully supported by the evidence and as there was no error in excluding the offered testimony, the judgment is affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BURKE concur.

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January Term, 1921

No. 9655.

ALLEN *v.* PATTERSON.

Decided June 7, 1920. Rehearing denied Jan. 10, 1921.

Action to revive judgment. Revival against one of two defendants.

Reversed.

1. JUDGMENTS—*Revival—Parties.* If a judgment creditor seeks by *scire facias* to keep a judgment in force, then he must proceed against *all* the defendants, and revive the specific judgment. If he desires to proceed against one only of the defendants, his remedy is by a new action in debt on the judgment.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. JOHN A. DEWEESE, Mr. JOHN L. MCPHAIL, for plaintiff in error.

Mr. W. W. DALE, Mr. JOHN A. RUSH, for defendant in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

THIS was a proceeding in the County Court of the City and County of Denver to revive by *scire facias* a judgment against plaintiff in error Frank P. Allen. The original judgment was a joint one against Allen and one Enos A. Sperry. The County Court refused the writ because Sperry was not joined, and the matter was carried on appeal to the District Court. The District Court took the opposite view

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and revived the judgment against Allen only. It is that order which is now here for review.

A number of errors have been assigned, but in determining the case it will be necessary to consider only the one which questions the legal right of plaintiff to have the judgment by these particular proceedings revived against one only of the two defendants.

The order of revival was brought under Chapter 19 of the Code which reads:

"A judgment in a civil action may be revived by filing a petition in the action, alleging the time the judgment was rendered, that it remains unsatisfied in whole or in part, stating the amount it is claimed the judgment should be revived for; which petition shall be verified, as complaints are required to be by this act.

"Upon filing such petition, the clerk shall issue an order to show cause why such judgment shall not be revived, if any there be, which order to show cause shall be directed to, and served on, the defendants, in the same manner as summons are required to be served. The order to show cause shall require the defendants to appear and show cause within ten days after service on them.

"The defendant may appear and answer the petition in the same manner complaints are required to be answered, and the court shall try and determine any issue so formed, the same as any issues made by pleadings are required to be tried and decided, and hear any evidence necessary to decide the matter.

"If the court decide to revive the judgment, in whole or in part, it shall so order, and the papers and proceedings shall be attached to the original files in the cause, and the entry of the revivor made in the judgment docket and judgment book, and if the petition is filed before the liens created by the original judgment have expired and a transcript of the entry of revivor in the judgment docket be filed with the recorder of the county as provided for in the case of original judgments, all rights under such judgments shall continue, and execution may issue on such revived judg-

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ment, the same as on the original judgment."

In discussing the propriety of reviving a judgment as to one of several defendants, it is said in Black on Judgments, vol. 1 (2d Ed.) sec. 491, at page 492:

"In case the judgment sought to be revived was rendered against two or more defendants, it is a practically universal rule that the *scire facias* must follow the judgment, and all the original defendants must be made defendants to the writ, if living; if one has died, the writ must be against the survivors jointly with the heirs and terre-tenants of the decedent (or his personal representatives in proper cases) and it is irregular to take proceedings against the surviving defendants alone, or against the representatives of the deceased without joining the survivors. Hence, where a plaintiff for any sufficient cause desires to revive a judgment against one or more of several defendants without joining all, his remedy is by an action or debt on the judgment; it cannot be done by *scire facias*. So where a writ to revive a judgment against several is not served on one of them, the plaintiff cannot discontinue the proceedings as to him and revive the judgment against the others."

In *Greer et al. v. State Bank*, 10 Ark. 455, the court in discussing the question gives cogent reasons why such revivor should not be permitted:

"The object of a proceeding by *sci. fa.* to revive a judgment is not to obtain a new judgment for the debt, but to procure execution of the judgment that has already been obtained. By the ancient common law, before the statute 13 Edw. I, ch. 45, which authorizes *sci. fa.* in such cases, if a plaintiff obtained judgment in any personal action, and remained quiet without taking out execution * * * within the year, he could not do so afterwards, but he was driven to his action of debt upon the judgment if he had in fact never received the amount; in which action the defendant might have an opportunity of proving that he had discharged it if he had really done so. * * * Now, the well settled rules of law touching the issuance of executions make it indispensible that they be issued in the name of the

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plaintiff or plaintiffs in the action, however many there may be, against all the defendants, where all the parties are in being. For if several have recovered, the payment of the debt or damages should be to them all; and if the recovery is from several, both the plaintiffs and the defendants have an interest that all should be joined; besides which the law requires that all the proceedings should harmonize, and that the whole record should be consistent with itself. If, then, execution were permitted for one or more of several plaintiffs against one or more of several defendants, these principles would be grossly violated. It would follow, then, that a judgment against three defendants, when all are in being and liable, if in a condition from lapse of time not to be executed until revived by *sci. fa.*, the legal effect of a revivor being as we have laid down, would be, when revived as to two only, in no better condition to be executed than before such revivor, because if, in such case, the execution was issued against the two, it would fail to follow the judgment and would be liable to be quashed for irregularity."

It is elementary that at common law *scire facias* to revive a judgment is not a new action, but simply a proceeding in aid of execution upon an old judgment, as is pointed out in the above quotation. This is alluded to in *Smith v. Stevens*, 133 Ill. 183, at page 191, 24 N. E. 511, at page 512, as follows:

"The proceeding by *scire facias* to revive a judgment is not an original suit, but is merely a continuation of the suit in which the judgment was rendered. *State v. Foster*, 7 Vt. 52; *Eldred v. Hazlett's Administrator*, 38 Pa. St. 16; *Hatch v. Eustis*, 1 Gall. 160; *Brown v. Harly*, 2 Fla. 159; *Pickett v. Pickett*, 1 How. (Miss.) 267; *Ingram v. Belk*, 2 Strobh. 207; *Fitzhugh v. Blake*, 2 Cranch, C. C. 37."

So also in *Funderburk v. Smith*, 74 Ga. 515, where the court had under consideration the question of allowing revivor against less than all of the defendants against whom the judgment had been rendered. At page 516 the court said:

"A *scire facias* to revive a judgment is not an original suit, but is a continuation of another suit, and is to be

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brought in the court where the judgment was rendered. *Dickinson v. Allison,* 10 Ga. 558; Code, §§ 3607, 3608. All the parties to the original judgment must be parties to the proceedings to renew or revive that judgment, and must be made parties, as provided by section 3608 of the Code. * * * The whole judgment must be revived, and not a part of it."

The above case was cited with approval in *Miller v. Melone,* 11 Okl. 241 (67 Pac. 479, 56 L. R. A. 620), where at page 259, the court said:

"We think it may be laid down as a general rule, and a rule supported by the great weight of authority, that all parties to the original judgment, if living and not discharged, must be made parties to the proceedings to renew or revive that judgment. In the case of *Funderburk v. Smith,* 74 Ga. 515, it was held that if one was not made a party and served with notice to revive, it was error to revive the judgment as to the other parties. The whole judgment must be revived and not a part of it."

In *Rowland v. Harris* (Tex. Civ. App.) 34 S. W. 295, it was held that if all original defendants to a judgment were not made parties in a proceeding to revive it by *scire facias,* such judgment was insufficient to support an execution by virtue thereof. Also in 23 Cyc. 1454, 15 R. C. L. 834, and 18 Enc. Pleading & Practice, 1066, the rule is laid down that all parties to a dormant judgment must be made parties in a proceeding to revive it.

It is urged, however, as our statute provides, "all joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants," that therefore the common-law rule as to revivor of judgments by *scire facias* has no force, but that a judgment creditor may elect as to which defendants he will proceed against by that method. This question was considered in *Eastman v. Crawford,* 126 Ill. App. 320, and in disposing of the contention that their statute making joint obligations joint and several superseded the common-law rule as to *scire facias* to revive a judgment, the court said:

"The record presents the question whether the *scire fa-*

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cias to revive a judgment against several joint defendants must not follow the original judgment, and the judgment thereon ought not also to be joint. * * * In our opinion the Illinois statute which provides that 'all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants,' does not apply to judgments. Until the common-law rule in regard to reviving judgments by *scire facias* is changed in this State by appropriate legislative enactment we must hold to it and enforce it."

Whether the statute, providing in effect that joint covenants and obligations shall be joint and several, extends to joint judgments we find it unnecessary to determine, but it is plain that until a dormant judgment has been revived according to law, it is unaffected by this provision. A judgment, if revived by *scire facias*, must be revived as an entity. That such is the intent of the provision under consideration appears from its express terms. The authorities aptly say: "The whole judgment must be revived, and not a part of it." To revive a judgment as to one of several defendants is to substitute a new judgment for the original, which was neither contemplated by, nor made permissible under, the revivor statute. Chapter 19 of the Code, *supra*, provides simply for a revivor of the old judgment, as such, and there is nothing therein to indicate that a several revivor can be had. Until, the common-law rule as to revivor by *scire facias* is expressly superseded by legislative enactment, or by some other lawful method, judgments must be revived as to all defendants or not at all. If plaintiff desired to proceed against one only of the defendants his remedy was by a new action in debt on the judgment, under paragraph 13, chapter 1, of the Code, which reads:

"Persons jointly or severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff."

If a judgment creditor seeks by *scire facias* to keep a

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judgment in force then he must proceed against all defendants and revive the specific judgment. If he selects the other method, namely, a new action on the judgment, he need join only such as he elects to join. This conclusion is not only supported by the weight of authority, but is in accord with principles of harmonious and consistent procedure, and also with equity and good conscience. Revivor proceedings are designed to protect not only the relationships and rights of plaintiffs, but also those of the defendants. To permit a plaintiff to have revival of a judgment against one only of several defendants might destroy the right of the defendant, thus made liable for the whole, to contribution from his co-defendants, and a surety of his indemnity as well, if he has paid the obligation of his principal, and so by non-action and laches a judgment creditor might deliberately defeat contribution or indemnity. This is manifest since the judgment creditor may select out of several defendants the one as to whom the judgment is to be revived, who might thus be left without remedy against his co-defendant for contribution or indemnity. Whereas in an action on the judgment a joint judgment debtor would have opportunity to bring in others equally liable and so protect his right of contribution or indemnity as the case might be, and this without harm or injury to a judgment creditor, who has an option between the two remedies, the one by *scire facias* against all judgment debtors, or by a new action against less than all.

Our investigation shows that the only decisions taking an apparently contrary view to the one above announced, on similar facts, are: *United States v. Houston et al.* (D. C.) 48 Fed. 207, which depends on a section of the Kansas Code providing in effect for the revival of judgments in the same manner as actions are originally brought, that is, against all or less than all who are liable. Also *Richardson v. Painter*, 80 Kan. 574, 102 Pac. 1099, 133 Am. St. Rep. 224, controlled by the same code provision. *Patterson v. Walton, et al.*, 119 N. C. 500, 26 S. E. 43, announces an opposite view to the one which we reach, but without comment, reason or argument, whatsoever, and *Vredenburgh v. Snyder*,

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6 Iowa, 39, holding, under their code provision, that a judgment may be revived against one of two co-defendants, without reviving it as to the representatives of the deceased defendant. Their provision is entirely different from ours.

Upon the record it is shown that the defendant Sperry was alive and resident within the State during the progress of these proceedings. We are clearly of opinion, upon both reason and authority, that he should have been made a party to the application, and the failure to do so was and is fatal to the validity of the purported revival. The judgment is reversed and the proceedings remanded with directions to dismiss them.

Judgment reversed and cause remanded with directions.

MR. JUSTICE SCOTT and MR. JUSTICE DENISON dissent.

No. 9706.

In re Application of The Denver, Boulder & Western Railroad Company to cease operation.

THE UP-TO-DATE MINING CO., ET AL. *v.* THE PUBLIC UTILITIES COMMISSION.

Decided May 6, 1920. Rehearing denied Jan. 10, 1921.

Proceedings before the Public Utilities Commission involving the cessation of service by a railroad company.

Order permitting the company to dismantle its road.

Order Vacated with Directions.

1. RAILROADS—*Dismantling—Public Utilities Commission.* An order of the public utilities commission for the dismantling of a railroad should be made only when it is evident that it is justified in fairness both to the public and the investors, and only when it appears that the management of the road has in the utmost good faith made every reasonable effort to increase

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the earnings of the road, has managed it economically and that the public will not properly support it.

Writ of Review to the Public Utilities Commission.

Mr. J. R. WOLFF, Mr. HORACE N. HAWKINS, for plaintiffs in error.

Messrs. BARDWELL, HECOX, MCCOMB & STRONG, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

NOVEMBER 24, 1917, the above named railroad company filed its application before the said commission for leave to discontinue service, dismantle its property and dispose of the same. A short time prior to said application, the commission had granted the railroad company's request for authority to increase its rates. On December 28, 1917, the said railroad, with other railroads of the country, passed under the control of the federal government. On June 25, 1918, after the increased rates went into effect, freight rates on roads under federal control were increased approximately twenty-five per cent over the rates then in force.

On May 27, 1919, on application of the railroad company, the cause initiated by the application of November 24, 1917 was reopened. The plaintiffs in error, protestants in the original proceeding, filed their respective protests with the commission denying the allegations of the railroad company to the effect that the road could not be operated so as to pay operating expenses and taxes; and alleging that the said company had not given a fair trial to the increased rates theretofore granted by the commission. They alleged further that the increase of twenty-five per cent in rates made them prohibitive as to a large volume of traffic; that the test, covering in part the winter months, in which the business of the said company was always at the lowest ebb, was not sufficient to determine the question at issue. It was also alleged that because the federal government discouraged travel in 1918, the railroad company was deprived

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of one of its chief sources of revenue, as it normally received considerable income from tourist travel, the road being one of great scenic beauty, and widely advertised as such. The protestants further allege that the owners of the company have failed to make a *bona fide* effort to increase and develop the business of the road; because the owners wanted to dismantle it while rails, etc., were in great demand; also, that because of the abnormal conditions due to the late war, all railroad revenues have been greatly decreased, and that if the said railroad be well managed, and a proper schedule of rates be established, it could be put on a paying basis.

The only witness on behalf of the railroad company was its manager. His testimony showed a considerable deficit for the period under consideration. The protestants introduced evidence to the effect that the twenty-five per cent increase of rates resulted directly in the loss of over $4,000.00 freight per year from one mine, and a general reduction in ore shipments; that the railroad company had failed to extend its terminal facilities at Nederland, which failure resulted in the loss of large revenue from freight and passenger traffic, and that the manager had so antagonized shippers that many refused to ship by the railroad, preferring to ship by wagon or truck.

July 23, 1919, the commission granted permission to the railroad to discontinue its service September 15, 1919. Said order was subsequently modified and permission granted to abandon service August 6, 1919. Motion by the protestants for a rehearing having been denied, the protestants bring the cause here for review.

The protestants rely upon the holding of the commission, upon the first hearing on the application of November 24, 1917, which is as follows:

"It is the duty of the applicant railroad to produce testimony before this Commission, prior to the withdrawal of its property from the public service, showing that after a fair trial, under economical management, the railroad company cannot pay its operating expenses under rates now

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in force and effect, or under additional increases of rates commensurate with the value of the service, if permitted by the Commission."

It is objected that the railroad company has not produced the evidence required by this rule. We think the objection is well taken. There is no direct evidence that the road under normal conditions might not earn enough revenue to justify its continued operation. The manager testified that it was uncertain to what extent the revenues might be increased; that the future alone could determine the question. The great preponderance of the evidence was to the effect that under economical management, the business could be considerably increased, and that, with a return to prewar conditions, the road would make much larger earnings. It will be observed that the test of the road's earning power was made during a period admittedly not normal. What the commission finds to be a prohibitive rate was enforced during a greater part of the time; passenger travel was discouraged and very greatly reduced; and the period was one in which many railroads were having great difficulty in making any return on the investment therein. The finding, then, that a fair trial of the rates allowed by the commission had been made, is not supported by the evidence. It is clear, beyond a possibility of a doubt, that under the circumstances shown in evidence there was no fair test of the road's earning abilities under normal conditions. It appears that the commission departed from its own rule, and on a showing of earnings in a period of general railway depression, came to the conclusion that the road could not earn its expenses.

The commission very properly recognizes that to dismantle the road is not a light matter. An order for dismantling should be made only when it is evident that it is justified, in fairness both to the public and the investors. In other words, it should be made only when it appears that the management of the road has, in the utmost good faith, made every reasonable effort to increase the earnings of the road, and has managed the same economically; and

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that the public will not properly support it. Under such circumstances, the public has no cause to complain of an order for dismantling. Until that condition has been fulfilled, however, the public interests prohibit the making of such an order. We are, therefore, of the opinion that the commission did not regularly pursue its authority in the making of said order. It is, therefore, vacated and set aside; with directions to the commission to enter an order requiring the road to be operated, and to make a fair test of its ability to earn the necessary income to justify its further operation.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BURKE concur.

No. 9714.

MINNEAPOLIS STEEL AND MACHINERY CO. *v.* YEGGY, ET AL.

Decided Oct. 4, 1920. Rehearing denied Jan. 10, 1921.

Action by agents to recover a commission on the sale of machinery. Judgment for plaintiffs.

Reversed.

1. AGENCY—*Commission.* An agent is not entitled to a commission on the sale of machinery where his principal negotiated the sale long prior to the making of the agency contract.

2. JUDGMENT—*On Issue Not Pleaded.* A litigant having tried a cause on a theory which is in accord with his pleadings, cannot sustain a verdict on evidence competent only under an entirely different theory.

3. APPEAL AND ERROR—*Excluded Evidence.* Where a question calls for a statement of fact clearly within the knowledge of the witness, it is error to sustain an objection thereto on the ground that it calls for a conclusion.

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Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. ARCHIBALD A. LEE, for plaintiff in error.

Messrs. HINDRY, FRIEDMAN & BREWSTER, for defendants in error.

MR. JUSTICE TELLER delivered the opinion of the court.

THE defendants in error had judgment against the plaintiff in error in an action to recover a commission on the sale of a tractor to one Bovard.

The complaint alleged that the plaintiffs were duly appointed agents to sell tractors for the defendant on a commission of ten per cent of the selling price; that they procured Bovard as a purchaser of a tractor at the price listed by defendant therefor, as per the agency contract; and that defendant with full knowledge that plaintiff had obtained such purchaser, sold a tractor to Bovard without plaintiffs' knowledge, by reason of which facts plaintiffs claimed a commission of $511.50. The answer admits the agency, and the sale of the tractor, denies that plaintiffs procured Bovard as a purchaser, and alleges that plaintiffs had no part in the sale. The replication sets out that,

"It was agreed that plaintiffs should receive compensation only upon such tractors and equipment as should be sold by or through them, or for which they should obtain purchasers."

Plaintiff in error contends that the undisputed evidence shows that defendants in error did not procure Bovard as a purchaser. Both Bovard and the general agent of defendant testified that, long prior to the making of the agency contract, they had been negotiating concerning a sale to Bovard. The record contains a letter from Bovard to the defendant, dated several days before plaintiffs obtained this agency, in which he asked for the price and time of delivery of a tractor. The record contains also a letter of defendant transmitting the Bovard letter to the Denver office, and a letter from the Denver agent to Bovard

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giving price, etc.; all prior to the agency contract upon which plaintiffs rely. It is clear, then, that plaintiffs did not procure Bovard as a purchaser.

Defendants in error, however, contend that the verdict is sustained by their testimony to the effect that there was an express agreement with defendant's agent that they would be protected "in their commission on the Bovard deal." To this plaintiff in error very properly objects that the cause of action set out in the complaint, and confirmed in the replication, is for procuring a purchaser, and not upon an agreement for a commission, in case of a sale to a specified person. A litigant having tried a cause on a theory which is in accord with his pleadings, cannot sustain a verdict on evidence competent only under an entirely different theory. Plaintiffs founded their action on an employment to procure a purchaser, and the procuring of one, and not upon an agreement for a commission in case a sale was made by the defendant to Bovard. The evidence being wholly lacking to support the claim as pleaded, the verdict cannot stand.

It is further assigned as error that the court sustained an objection to a question to Bovard as to whether or not the plaintiffs had any influence upon him in the matter of the purchase. The objection was sustained on the ground that the question called for a conclusion.

The question did not call for a conclusion of the witness, but for a statement of a fact clearly within his knowledge. The court erred in sustaining the objection. *B. & W. R. D. Co. v. L. C. D. & R. Co.*, 36 Colo. 455, 86 Pac. 101.

The judgment is reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BURKE concur.

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No. 9647.

McKEE, SHERIFF, ET AL. v. ELWELL.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Action to restrain proceedings under execution levy on real estate. Judgment for plaintiff.

Affirmed.

1. APPEAL AND ERROR—*Finding of Trial Court.* A finding of the trial court on conflicting evidence will not be disturbed on review.

2. REAL PROPERTY—*Trust Deed—Redemption—Assigns.* Under sec. 6868, R. S. 1908, providing that the assigns of a grantor may redeem from a sale under trust deed, "assigns" includes the assignee of the equity of redemption.

Error to the District Court of Pueblo County, Hon. J. E. Rizer, Judge.

Mr. JAMES F. DRAKE, Mr. WILLIAM B. STEWART, for plaintiffs in error.

Mr. JOSEPH C. ELWELL, Mr. JOHN W. ELWELL, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

SARAH D. Elwell, defendant in error, obtained a decree restraining McKee, Sheriff, and Drake, a judgment creditor of Annie L. Elwell, plaintiff's mother, from further proceeding in a levy on certain real estate by virtue of an execution against the mother, and the defendants bring the case here on error.

Annie L. Elwell owned the real estate in question subject to a deed of trust given by her; she quit-claimed the property to her daughter, the plaintiff, subject to the deed of trust; a foreclosure sale was afterwards had under the trust and a certificate of sale issued; Annie L. Elwell redeemed and took the certificate of redemption in her own

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name. The defendant Drake then sued out his execution and McKee levied. Plaintiff then brought this suit. Drake, by answer and cross-bill, claimed that the quitclaim deed was in fraud of creditors and that the sale and redemption restored the title to Annie L. Elwell.

Both the mother and daughter testified that the former redeemed with plaintiff's money, as her agent and for her sole benefit, and the court specially found such to be the case.

The question whether the sale was fraudulent was left to a jury who found it was not, and the court adopted the finding.

The plaintiffs in error rely upon two propositions: 1. The quitclaim deed was fraudulent. 2. The title was in Annie L. Elwell when the levy was made.

As to the first proposition, the matter has been decided on conflicting evidence by both court and jury and the decision will not be disturbed.

As to the second, since the court has found that the redemption was in the interest of plaintiff and with her money, it follows that at the time of the levy Annie L. Elwell had no interest in the subject thereof even if plaintiffs in error are right in their theory that a redemption by her would restore to her the title. The statute provides:

"It shall be lawful for any grantor, his heirs, executors, administrators, assigns or subsequent encumbrancers, whose lands and tenements shall be sold by virtue of any trust deed within six months from such sale to redeem * * *." R. S. 1908 § 6868.

It is argued that the above word "assigns" does not include purchasers of the equity of redemption but only assignees by operation of law, that no one can redeem after sale except those whom the statute specifies and that therefore the plaintiff had no right to redeem, and so her acts in that behalf are void.

There are several answers to that argument but one is enough, *viz.*, that "assigns" includes the holder of the equity of redemption. We can see no ground for holding other-

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wise. 5 C. J., Title "Assigns." Jones on Mtgs. 1051; *Cooper v. Maurer*, 122 Iowa 321, 98 N. W. 124.

Judgment affirmed.

MR. JUSTICE TELLER sitting for MR. JUSTICE SCOTT.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE TELLER concur.

No. 9690.

THE DENVER & RIO GRANDE RAILROAD CO. *v.* KOMFALA.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Action against employer for personal injuries sustained by employe. Judgment for plaintiff.

Reversed.

1. TRIAL—*Directed Verdict.* Where under the undisputed evidence and law applicable thereto the plaintiff ought not to recover, on motion a verdict should be directed for defendant.

Error to the District Court of Fremont County, Hon. James L. Cooper, Judge.

Mr. E. N. CLARK, Mr. G. A. LUXFORD, for plaintiff in error.

Mr. A. L. JEFFREY, Mr. EDWIN H. STINEMEYER, for defendant in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

KOMFALA had judgment for injuries from a fall which he claimed was caused by the neglect of the railroad company to furnish a safe place to work. He was employed by the Denver & Rio Grande Railroad Company and was at work in the Royal Gorge. He was directed to climb a cliff

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twenty feet high and did so with a ladder sixteen feet long, pulling himself from the top of the ladder to the top of the cliff by taking hold of a crevice in the rock. He stood upon a bench above the cliff and held a guy rope until directed to come down. He testified that he said it was dangerous, but that the foreman answered "Come down or stay up." He started to come down, holding to the same crevice, but before his feet reached the top of the ladder the rock gave way so that he fell and received injuries to his feet.

Previously, on the same day he had, with others, climbed to and come down from the same bench, by another way, which, by the undisputed testimony, is shown to have been feasible and reasonably safe.

The defendant asked for a directed verdict which was denied.

The court instructed the jury as follows:

"* * * And if you find from the evidence that the plaintiff had a choice of ways to descend, one of them obviously and apparently hazardous and dangerous and the other reasonably free from danger, it was the duty of the plaintiff to descend the safe way."

This instruction stated the law correctly, but that law under the evidence required a directed verdict for the defendant.

There are other assignments of error which we think well taken, but it is not necessary to notice them.

The judgment should be reversed with directions to dismiss the case.

MR. JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

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No. 9763.

HEATON v. NELSON.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Action on promissory notes. Judgment for defendant.

Affirmed.

1. REAL PROPERTY—*Conveyance—Title.* An unqualified agreement to convey real property imports that a title to which vendee cannot lawfully complain will be furnished. A tax title is not such.

2. *Agreement to Convey—Rescission—Tender.* If the vendor cannot furnish or refuses to furnish a good title when due or in a reasonable time, the vendee may rescind, defend a suit for the unpaid purchase money and recover what has been paid.

   A tender of the purchase price by the vendee before rescission, is not necessary.

3. APPEAL AND ERROR—*Harmless Error.* A party cannot complain of an error where the judgment must have been the same if the error had not occurred.

Error to the County Court of Pueblo County, Hon. Frank G. Mirick, Judge.

Mr. M. J. GALLIGAN, for plaintiff in error.

Mr. P. J. DUGAN, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THIS was an action before justice of the peace on three promissory notes for $50 each, appealed to the county court of Pueblo county, where defendant had judgment on the notes and for $100 on a counterclaim. Plaintiff brings error.

The plaintiff and defendant had entered into the following contract and the notes in suit were those referred to therein:

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"Pueblo, Colorado, January 24, 1917. Received of Henry Nelson the sum of One Hundred Dollars ($100.00), as payment on my house and lots at Turret, Chaffee County, Colorado, to be known as lots 7 and 8 in the said town of Turret. I hereby agree to sell the said property, including all improvements now thereon for the total price of Two Hundred and Fifty Dollars ($250.00), the said One Hundred Dollars ($100.00), which is hereby acknowledged, and three notes due as follows:

Fifty Dollars ($50) due on February 24, 1917.

Fifty Dollars ($50) due on April 24, 1917.

I agree to furnish and deliver Warranty Deed to said property upon payment of the said last note of Fifty Dollars ($50) on April 24, 1917.

Fifty Dollars ($50) due on March 24, 1917. The said Henry Nelson is given permission to take possession of said property from this day and date.

David Heaton."

Heaton had no title when the contract was made nor when the last note matured though some months later and before suit he acquired a tax title and tendered a deed. Nelson never offered or tendered payment of the notes.

An unqualified agreement to convey imports that a title of which vendee cannot lawfully complain will be furnished. *McCutchen v. Klaes,* 26 Colo. App. 374, 378, 143 Pac. 143; *Price v. Immel,* 48 Colo. 163, 109 Pac. 941. A tax title is not such. If the vendor cannot furnish or refuses to furnish a good title when due or in a reasonable time, the vendee may rescind, defend a suit for the unpaid purchase money and recover what has been paid. *Weghorst v. Clark,* 66 Colo. 535, 180 Pac. 742; *Smith v. Lamb,* 26 Ill. 396, 79 Am. Dec. 381; *Siglin v. Frost,* 173 Mass. 284, 53 N. E. 820; *Lowe v. Harwood,* 139 Mass. 133, 29 N. E. 538; *Potter v. Ranlett,* 116 Mich. 454, 74 N. W. 661; *Bennett v. Phelps,* 12 Minn. 326 (Gil. 216); *Auxier v. Taylor,* 102 Iowa 673, 675, 72 N. W. 291; *Davis v. Van Wyck,* 64 Hun, 186, 18 N. Y. Supp. 885. See, also, *Heaton v. Myers,* 4 Colo. 59.

A tender of the purchase price by the vendee before re-

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scission was not necessary. *Byers v. D. Cir. R. Co.*, 13 Colo. 552, 22 Pac. 951; *Smith v. Lamb, supra; Bennett v. Phelps, supra; Auxier v. Taylor, supra.*

The court left to the jury only the question of the identity of the lots to which the above agreement referred. Since there was no dispute about it, that question should, with the others, have been determined by the court and a verdict directed for the defendant, both as to the notes and for the $100 payment. The plaintiff in error cannot, however, complain of this error, because the judgment must have been the same. The judgment should, therefore, be affirmed.

MR. JUSTICE TELLER and MR. JUSTICE BAILEY concur.

MR. JUSTICE TELLER and MR. JUSTICE BAILEY sitting for MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE SCOTT

No. 9777.

PRIMEAU v. ACTON.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Action to recover possession of a mining tunnel. Judgment for defendant.

Reversed.

1. MINES AND MINING—*Possession of Tunnel—Injunction.* The provisions of sec. 175 code 1908, relative to possession of mining property, are applicable to tunnels and tunnel sites, where one is deprived of possession while temporarily absent.

2. *Action for possession—Title.* In an action for possession under code sec. 175, the question of title to the property involved is irrelevant.

3. *Possession—Rightfulness of.* One in possession of a mining tunnel cannot lawfully be deprived of the property by another who takes possession during the temporary absence of the

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claimant, and in an action by the latter to recover, rightfulness of possession is not an issue under code sec. 175.

4. *Surrender of Possession—Evidence.* The claim of surrender of possession of a tunnel site is not supported by an affidavit which is only in evidence for the purpose of identification and explanation of the premises and which shows only the surrender of a mill site and not the tunnel site.

Error to the District Court of Summit County, Hon. Francis E. Bouck, Judge.

Mr. LYNDON S. SMITH, for plaintiff in error.

Mr. BARNEY L. WHATLEY, Mr. CARL A. KAISER, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

PRIMEAU brought suit against Acton under Section 175 Code 1908, alleging that he (plaintiff) was in possession of the A. R. K. Tunnel and Tunnel Site and that during his temporary absence defendant took and remained in possession thereof, and asked an injunction to compel restoration. The court denied the injunction on the ground that a tunnel was not mining property within the meaning of the said section.

The judgment was reversed by this court and the case remanded. *Primeau v. Acton,* 66 Colo. 603, 185 Pac. 255, where the section in question is quoted.

Upon the hearing, which was had in December, 1919, the plaintiff showed by undisputed testimony that he was in possession of the tunnel and site, that, though he himself was absent from this State, one Groenig, his foreman, lived near and was frequently on the premises and had charge of them and the personal property thereon, was never away more than two or three days at a time and was absent in that way when defendant took possession, fitted a door on the tunnel mouth and posted the notice shown in the case as previously reported. The court denied the injunction. Upon what ground does not appear.

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It seems to us that the case is a typical one for the granting of an injunction under the above-mentioned statute. The seizure of the tunnel was exactly the sort of thing the law was intended to discourage.

The court rightly held that the question of title was irrelevant, so we do not know what real basis defendant had for his highhanded action in seizing for his own use and benefit property which had been created by another at an expense of $6,000.00, but all that being excluded we can see nothing left of defendant's case.

The claim that the proceedings to make a valid location of a tunnel site and tunnel were not shown is of no force because that merely goes to the question of plaintiff's title. To require plaintiff to show these things is to require him to prove the rightfulness of his possession to question which is forbidden by the section above cited. There was a hole called a tunnel and some ground around it, used in connection with it, all for mining purposes, all in possession of plaintiff by his agent in whose temporary absence defendant entered. That was enough.

Considerable evidence was taken on the question of when work stopped on the tunnel and site. This also is irrelevant. It goes only to plaintiff's right of possession. That possession even if wrongful could not be taken from him in the manner shown in the evidence unless it was obtained by him in the way denounced by Section 175.

The only other point necessary to notice is the claim that plaintiff had surrendered possession to one McFarlane in July, 1918. That is shown only by McFarlane's affidavit which was stricken out for all purposes except for purposes of identification and explanation of the premises, and moreover it shows only the surrender of the Hamilton Mill-site and not the tunnel or tunnel site.

The judgment should be reversed and the case remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE TELLER sitting for MR. JUSTICE SCOTT.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE TELLER concur.

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No. 9931.

OWENBEY v. SILVERSTEIN.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Action under sec. 21 of the code, to determine a claim which defendant is alleged to have asserted against plaintiff. Judgment for defendant.

Reversed.

On Application for Supersedeas.

1. CONTRACT—*Form.* A letter which is intended to state the terms of a contract is conclusive of the matters which it covers and the parties are bound by its terms.

2. APPEAL AND ERROR—*Contract.* It is error for a trial court to leave to the jury the matter of determining what the terms of an express contract are, instead of directing them to the terms of a letter covering the matters involved, which is conclusive upon the parties.

3. *Instructions—Exceptions.* Where a litigant by his counsel states clearly to the court his objections to instructions on a particular point, and offers instructions thereon, to the refusal of which he duly excepts, the question may be presented for review although there were no formal exceptions to the instructions as given.

4. ATTORNEY AND CLIENT—*Attorney Fees.* An attorney who has entered into a contract to perform services for a client in connection with certain litigation, for a specified amount, is entitled to receive additional compensation for services rendered, which are not mentioned in, nor covered by the contract.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. B. F. REED, Mr. ROBERT W. STEELE, JR., Mr. RUSSELL W. FLEMING, for plaintiff in error.

Mr. G. DEXTER BLOUNT, for defendant in error.

Department Two.

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MR. JUSTICE DENISON delivered the opinion of the court.

OWNBEY brought suit under § 21 of the Code, which provides for action by one person against another to determine a claim made by the latter against the former. The defendant, Silverstein, had a verdict and judgment for upwards of $7,000. Ownbey asks for a supersedeas.

The material facts are that about April 20th, 1916, Ownbey employed Silverstein as attorney to perform legal services in connection with certain litigation, referred to as the Wootton litigation and the Delaware litigation, and had some agreement about fees. The defendant, Silverstein, performed services in these matters until July 11th, 1917, when he wrote the following letter:

Denver, Colo., July 11, 1917.

Col. J. A. Ownbey,
Boulder, Colo.

Dear Sir:

This is to acknowledge receipt of retainer of $500.00, which was agreed upon at the time I came into the litigation instituted by the Morgan executors and the Wootton Company against yourself in the United States Court.

At your request I also add in this letter the terms of our understanding in relation to fees. It is our agreement that my fee shall be $5,000.00 in this litigation, this to cover all services rendered and to be rendered to the end of the litigation, even if the case goes to the Supreme Court of the United States, and including whatever services I may be able to render in the Delaware litigation. In the event that we succeed in getting an allowance for you on your claim against the Wootton Company in the accounting now pending before the Master in Chancery above the amount stated in the original and supplemental Report already on file with the Master, then I am to receive twenty per cent of such additional amount at the time it is paid.

Of course, it is understood that in the event that the litigation goes entirely against us, then my fee will not be in accordance with the above, but will be based on a very

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reasonable allowance for the time actually spent; in any event, not to exceed one-half of the above amount.

Yours very truly,

(Signed) Harry S. Silverstein.

O. K.

J. A. Ownbey.

Defendant continued to perform services till December, 1918, and then, while the litigation was unfinished, with Ownbey's consent, withdrew entirely from his employ.

The plaintiff throughout the trial insisted that this letter was a contract and conclusively fixed the terms of the understanding between the parties concerning the Wootton and Delaware litigations, but the court was of the opinion that it was a mere extra-judicial admission, on the part of the defendant, that such were the terms of the understanding between him and his employer, and so subject to variation by oral testimony. In this we think the court was in error. On its face the document was given as a statement of the terms of the understanding between the parties. There is no difference in our judgment between a written contract and a statement in writing of the terms of a contract. In either case the writing is but the expression and evidence of the mutual understanding of the parties, which is the real contract. "*Know all men* by these presents," that we have agreed thus and so. "This Indenture *Witnesseth*" our contract. In either case the only questions are, Was the writing intended to state the terms of the contract? and, What transaction or transactions does it cover? Of what it covers it is conclusive. The letter itself shows and says that it states the terms of the contract and covers the Wootton and Delaware litigations. Upon these matters, therefore, each side is concluded by it.

A more difficult question is whether the error is prejudicial; but an examination of the record, especially the colloquies between counsel and the court and the instructions given and refused, convinces us that it is. Throughout the trial the court went upon the theory that this letter was not a contract and left to the jury the question of what the

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contract was. A large amount of evidence was introduced as to the value of the services of the defendant in respect to the Wootton and Delaware litigations. This evidence was relevant and competent, because the contract had been abandoned by the parties and therefore the defendant could only recover, upon an implied contract, the reasonable value of the services performed, as the court correctly instructed. *Simmons v. Lawrence Duck Co.*, 133 Mass. 298; *Marcotte v. Beaupre*, 15 Minn. 152. See also *Cody v. Raynaud*, 1 Colo. 272, 277. The court moreover correctly instructed the jury that such recovery by the defendant could not exceed the contract price for the whole work had it been completely performed, and so, since the court left it to the jury to say what the terms of the express contract were, instead of directing them to the terms of the letter, the instructions gave a wrong basis for computation of the defendant's damages, to the prejudice of plaintiff.

It is urged that the plaintiff did not except to these instructions. It is true he did not formally do so, but he stated clearly to the court his objection to them on this particular point and offered instructions thereon, to the refusal of which he duly excepted and thus raised the same question.

Defendant claims that during the period of his employment he performed services of various kinds not included in the litigation mentioned in his letter. For these, of course, he should recover reasonable compensation.

The judgment should be reversed and the cause remanded for new trial.

MR. JUSTICE ALLEN sitting for MR. JUSTICE SCOTT.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE ALLEN concur.

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No. 9670.

RUBEY v. CLAMMER.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Action on contract for damages and alleged conversion of pledged corporate stock. Judgment for plaintiff.

Affirmed.

1. APPEAL AND ERROR—*Finding of Fact.* The appellate court will not disturb a finding of fact made upon conflicting evidence.

2. PLEDGE—*Retention of Property.* Where property is pledged to indemnify one for losses he may sustain, or payments made, on account of failure of pledgor to carry out the terms of a contract, pledgee is not entitled to retain the property where no losses or payments for which he could claim indemnity, are established by the evidence.

3. PLEADING—*Evidence—Burden of Proof.* In an action on contract, a defense, which only sets up a different version of the contract upon which the action is brought, is to be treated as a general denial, and imposes no burden upon the defendant; but the plea of a version which would not only defeat recovery, but would justify a judgment for defendant, and is in fact presented as the basis of a cross complaint, requires affirmative proof.

Error to the District Court of Larimer County, Hon. Neil F. Graham, Judge.

Messrs. STOW, STOVER & MANTZ, Messrs. SYMES & STEPHENS, Mr. IVOR O. WINGREN, for plaintiff in error.

Mr. R. W. FLEMING, for defendant in error.

MR. JUSTICE BURKE delivered the opinion of the court.

IN the court below defendant in error was plaintiff and plaintiff in error was defendant. They are hereinafter so designated.

The parties hereto were jointly interested in ranch property which they conveyed to the La Prale Livestock Company (hereinafter referred to as "the company") and

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took stock therein for their respective interests. Thereafter they entered into a contract for the exchange of certain property. This contract included a number of cattle which, by the terms thereof, passed from defendant to plaintiff. A written instrument was signed by them, one clause of which related to these cattle. Plaintiff contends that when signed it read as follows:

"The said cows are estimated at this time to number .....and are to be conveyed at the price and value of $.....per head."

Defendant alleges that at the time the signatures were affixed these blanks had been filled in and the clause read thus:

"The said cows are estimated at this time to number 216 head and 93 head of calves, and are to be conveyed at the price and value of $75 per head for the cows and $30 per head for the calves."

By the terms of the contract plaintiff's stock in the company was pledged to defendant "as collateral security for the performance of all obligations of said S. H. Clammer herein mentioned," and the instrument further provided that this pledge should "only be construed to be security held by him (Rubey) to enforce the performance hereof and to indemnify him from any loss that he may sustain, or payments he may be forced to make, or make voluntarily, on account of the failure of said S. H. Clammer to perform his contracts and agreements herein set forth."

Plaintiff brought this action for an alleged difference in agreed values of the property exchanged, plus the value of his pledged stock in the company, which he alleges defendant had converted. His contention being that the contract price of the cattle mentioned was the price they brought on the market, and that this agreement was oral. The jury returned a verdict for plaintiff in the sum of $14,006.75 and made a special finding that defendant was entitled to the immediate transfer and delivery to him of certain water stock as provided in the contract, the failure to transfer which defendant set up as one of the grounds justifying his

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retention of the pledged stock. Judgment was entered on this verdict and defendant brings the cause here for review on error.

BURKE, J. after stating the facts as above.

Defendant makes three contentions which it is necessary to notice. 1. That the contract in question was in terms as alleged by him and was in writing. 2. That by the terms of said contract plaintiff was not entitled to a return of his pledged stock until he had complied with all the provisions thereof, which the special finding of the jury shows he had not done. 3. That Instruction No. 7 given by the court constituted prejudicial error, in that the court thereby advised the jury that the burden of proof was upon defendant to establish the contract as set out in his cross complaint.

1. As to the terms of the contract concerning the cattle, and the question as to whether it was oral or in writing, plaintiff's testimony, corroborated by certain facts established, supported his contention. Defendant's testimony, corroborated by certain facts established, and some additional oral evidence, supported his contention. This court will not disturb a finding of fact made upon conflicting evidence. *Hallack, et al. v. Stockdale, et al.*, 14 Colo. 198, 200, 23 Pac. 340.

2. By the terms of the contract as asserted by defendant, plaintiff's stock was pledged to enforce its performance. This clause the contract itself interpreted specifically to mean a pledge "to indemnify him (defendant) for any loss that he may sustain, or payments he may be forced to make, or make voluntarily, on account of the failure of said S. H. Clammer to perform his contracts and agreements herein set forth." No such loss or payments for which defendant could claim indemnity were established by the evidence. The only material particular in which the default of plaintiff is asserted is the matter of the delivery of the water stock. As this was covered by the judgment the objection amounts only to a contention that the action was prematurely brought. But at the time of the execu-

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tion of the contract this water stock was in pledge and defendant took it subject thereto. He thereafter received a deed for certain real estate which likewise included this stock. According to his own version of the contract he was not to turn over the cattle until plaintiff "has performed, or stands ready to perform, all his agreements contained in this contract." Defendant had turned over the cattle and this must be construed as an acceptance on his part of the transfer of the water stock by the deed in question.

3. Under plaintiff's version of the contract he was entitled to recover. Under defendant's version he was entitled to a judgment on his cross complaint. Plaintiff's failure to establish the contract as alleged by him constituted no proof that defendant's contention was correct. The plea of a different version of a contract, which if true would merely defeat recovery, is one thing; the plea of a version which would not only defeat recovery, but would justify a judgment for defendant, and is in fact presented as the basis of a cross complaint, is another and entirely different thing. The first is to be treated as a general denial and imposes no burden upon the defendant. *Mott v. Baxter*, 29 Colo. 418, 68 Pac. 220. The second requires affirmative proof. *Wright v. Stewart*, 19 Wash. 179, 52 Pac. 1020.

Finding no prejudicial error in the record the judgment is affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE TELLER concur.

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No. 9653.

MATHEWS, ET AL. v. MATHEWS, ADMINISTRATOR.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Action by administrator to recover property alleged to belong to estate of decedent. Judgment for plaintiff.

Reversed.

1. FRAUD—*Burden of Proof.* The burden of proving fraud is upon the party alleging it.

2. REAL PROPERTY—*Setting Aside Deed—Degree of Proof.* To set aside duly and formally executed instruments conveying title to real property on the ground of fraud, the evidence must be of greater strength and probative force than in ordinary civil cases; to warrant such relief, it must be direct, strong, highly convincing, clear, precise and indubitable.

3. JUDGMENT—*Unsupported by Evidence.* Upon review of the case it is held that the evidence fails to establish a single allegation of the complaint and the judgment is reversed with directions to dismiss the action.

Error to the District Court of the City and County of Denver, Hon. John T. Shumate, Judge.

Mr. BENJAMIN GRIFFITH, Mr. JOHN H. LEIPER, for plaintiffs in error.

Mr. JOSEPH N. BAXTER, for defendant in error.

MR. JUSTICE BAILEY delivered the opinion of the court.

THIS cause is here on writ of error to review a judgment of the District Court of the City and County of Denver, wherein it is decreed that plaintiffs in error hold in trust certain real and personal property, which they are directed to turn over to a trustee appointed by the court, for the benefit of the estate of Cornelius M. Mathews, of which estate plaintiff is administrator, with will annexed. The parties are all brothers.

The first cause of action alleges in substance that plaintiff

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is the administrator of the will of his brother, Cornelius, which had been admitted to probate in Ohio, and in this state as a foreign will. This instrument, after devising certain specific property, located in Ohio, provides that the remainder of the property of the testator, without describing its character, extent or whereabouts, be equally divided between the persons therein designated and named as legatees. It is then alleged that the estate is insolvent and that the specific property devised by the will has been sold to pay debts of the estate. It is further therein alleged that a certificate for certain shares of stock in a Colorado corporation, now in the hands of Jerome Mathews, was made to Cornelius in his lifetime, had never been transferred, was his property at the time of his death, and now constitutes part and parcel of his estate. That such certificate was pledged to a third person by Cornelius for a small sum of money, that it was redeemed by Jerome with money belonging to Cornelius, and that the former now declines to surrender it.

In the second cause of action it is alleged that Jerome and James Mathews held in trust, having paid no consideration therefor, certain real property in Elbert County, Colorado, for Cornelius, aggregating 3600 acres more or less; that eight hundred and eighty acres of the land was conveyed without consideration by Cornelius to Jerome with intent to defraud creditors of Cornelius; that the eight hundred and eighty acres, together with the remainder of the land, was to be held and disposed of for the benefit of Cornelius. That, in addition to other transactions therein at length set forth, a portion of such land was exchanged for certain property in Denver, Colorado, the title to which was vested in Jerome, who refuses and declines to turn over the same, or to account for the rents and profits thereof to plaintiff, as the legal representative of the estate of Cornelius.

The third cause of action alleges substantially that at the time of the death of Cornelius there was approximately $12,000.00 worth of horses and cattle, belonging to him, in

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possession of Jerome, and that Jerome has converted the same to his own use. The complaint sets out in detail the method by which the stock is claimed to have come into possession of Jerome.

The fourth cause of action in brief details that certain residence property in Denver, Colorado, was purchased with money belonging to Cornelius, the title to which, to defeat creditors of Cornelius, was held in the name of James, but under the control of Jerome, which was sold by James for $3,260.00, and the money wrongfully converted by the defendants to their use and benefit.

The fifth cause of action sets forth a letter written by Jerome to Cornelius, wherein it is alleged the trust relied upon by plaintiff is disclosed and admitted by Jerome; also an alleged declaration of trust by Cornelius, wherein he directs that all of his property in the state of Colorado be distributed among his relatives, including the two plaintiffs in error, as therein specified.

The answer to the first cause of action denies that the certificate of stock is the property of the estate, and alleges that it was redeemed by Jerome with his own funds, and an offer is made to deliver the certificate to the estate upon payment of the amount paid by Jerome to redeem it. For further answer it is alleged that the certificate is the property of Jerome, under an adjustment of mutual accounts, between Cornelius and himself, had in 1909. The statute of limitations is also plead in defense of each and every of the several causes of action relied upon.

The answer to the remainder of the complaint in substance denies all the material allegations, and declares that part of the land involved was the homestead of James C. Mathews, that another parcel was the homestead of the wife of Jerome, that other parcels thereof were acquired by Jerome from third persons, either by devise or purchase, and that as to the major portion of the land involved Cornelius never at any time or at all had title to, or right or interest therein of any sort or kind.

The trial court found the issues in favor of the plaintiff

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upon the first cause of action, and ordered the stock certificate in question turned over to the trustee for the benefit of the estate. On the second cause of action the decree recites that Cornelius in 1909 conveyed to Jerome certain lands aggregating nine hundred and twenty acres, in trust nevertheless for Cornelius, and that Jerome converted the lands to his own use. After describing other tracts of the parcel involved, as not belonging to Cornelius, but which were exchanged, together with the nine hundred and twenty acres, for the improved property in Denver, all of that Denver property is declared to be the property of the estate of Cornelius, and ordered transferred to the trustee for the use of such estate. In reference to the live stock the court found that it was of the value of $12,000.00, and held by Jerome and James in trust for Cornelius. The Denver residence property mentioned in the fourth cause of action, standing in the name of James, was specifically held to be the property of Jerome and James, by the court, but in the fifth cause of action, in finding that the letter set out therein was a declaration of trust in favor of Cornelius, the court there finds such Denver property to likewise be the property of Cornelius, and also included in the trust. In fact, the decree found that all of the property mentioned in the complaint and involved in the suit was and is the property of Cornelius, and that it now belongs to his estate.

The object of plaintiff in his suit was to set aside duly and formally executed instruments conveying title to real estate, and to also nullify other transactions concerning the purchase, sale and transfer of personal property, on the ground of fraud. The burden of proof to show the alleged fraud was of course upon him; to establish such fact, so as to have the deeds and sale transfers set aside and a trust declared, the evidence must be of greater strength and probative force than in ordinary civil cases; indeed, the evidence to warrant such relief under such circumstances must be direct, strong and highly convincing. *Tourtelotte v. Brown,* 4 Colo. App. 377, 36 Pac. 73. It must be clear,

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precise and indubitable. *D. & R. G. R. R. Co. v. Sullivan*, 21 Colo. 302, 41 Pac. 501.

It appears conclusively that the stock certificate involved was given by Cornelius as collateral security for the payment of a loan made for his own use, and that Jerome redeemed it before the death of Cornelius for $866.00. It appears that the certificate was given by Cornelius to Jerome in a settlement between the brothers had in 1909. Although it is contended that there was no such settlement, it, however, appears beyond question from the evidence contained in the record, that Cornelius was at that time indebted to Jerome in the sum of $10,453.72, and that a settlement was then had which showed that amount to be due Jerome from Cornelius. This is established by original checks, vouchers and other documents, representing transactions extending over several years, during which period Cornelius appears to have been constantly pressed for money, which Jerome supplied, and also that Jerome assisted him in other ways, to prevent his property being seized by creditors. The statement of accounts is not disputed or questioned as to any item whatever. In 1909, upon request of Jerome for security for monies so advanced, Cornelius deeded to him the nine hundred and twenty acres of land originally owned by him, or what remained of it, about eight hundred and eighty acres, and likewise turned over to Jerome certain live stock, cattle, horses, etc., which completely divested Cornelius of property of every kind and nature in Colorado.

The land last above mentioned was included in the forty-one hundred and sixty acres which, together with certain live stock and farming implements, were traded by Jerome and his wife to one Rudolph, for the Lucerne Apartments in Denver and about $2,500.00 in cash. It is conclusively shown that outside of the land conveyed by Cornelius to Jerome, the remainder of the forty-one hundred and sixty acres was made up of land purchased direct by Jerome under contract from The Union Pacific Land Company, known as Union Pacific railroad land, together with a homestead

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belonging to James of one hundred and sixty acres, three hundred and twenty acres received by devise by Jerome from another brother, John, the latter's homestead, three hundred and twenty acres homestead land purchased by Jerome at sheriff's sale, property of a third person, and three hundred and twenty acres the homestead of Jerome's wife. All of this land, upwards of thirty-odd hundred acres, had been acquired after Cornelius removed from Colorado, and the eleven hundred and twenty acres, described as homestead land, after his death. This particular eleven hundred and twenty acres was secured by patents direct from the government, as noted above and manifestly could not have been acquired with money belonging to Cornelius, or any other outside person. The record is barren of testimony having a tendency even to show the expenditure of any money belonging to Cornelius, in any of these transactions, including the purchase of the so-called railroad land. There is no evidence whatever upon which the findings of the trial court can properly be upheld and approved. The letter written by Jerome to Cornelius is the only matter which has any tendency to even suggest the existence of a trust in favor of the latter. Beside, its contents is so vague, uncertain and indefinite that any conclusion to that effect amounts to no more than mere conjecture, and titles may not be thus vested or divested. Moreover, the evidence established affirmatively a contrary situation. The letter merits no serious consideration as a basis for decreeing a trust. In general the evidence fails to establish a single allegation of the complaint, nor does it contain anything to support or uphold the theory of a trust in favor of Cornelius as to any part of the property involved. The judgment will therefore be reversed and the cause remanded, with directions to dismiss the complaint for lack of equity, and because of a total failure of proof to make out any cause of action whatsoever.

Judgment reversed and cause remanded with directions.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE ALLEN concur.

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No. 9707.

STALEY v. KLETT.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Motion for judgment on bond given in connection with the issuance of a temporary restraining order. Motion denied.

Affirmed.

1. INJUNCTION—*Restraining Order—Bond.* Where the showing was ample to support the issuance of a temporary restraining order under sec. 164 of the code, a motion for judgment on the bond executed pursuant to the provisions of the section was properly denied, notwithstanding the restraining order was eventually set aside and vacated.

Error to the District Court of Bent County, Hon. A. F. Hollenbeck, Judge.

Messrs. HILLYER & KINKAID, for plaintiff in error.

Mr. C. E. SYDNER, Messrs. SABIN, HASKINS & SABIN, for defendant in error.

MR. JUSTICE BAILEY delivered the opinion of the court.

THIS cause is here to review a judgment which set aside and vacated an *ex parte* restraining order, and denied a motion for judgment in favor of the defendant on the bond filed as required by law.

The restraining order was issued under section 164 of the Code, which provides, *inter alia*, as follows:

"And provided further, That no such temporary restraining order or writ of injunction shall issue without notice until the complainant shall have executed a bond, in addition to the bond or undertaking provided for in section 147 of this code, with not less than two sureties, and in an amount to be fixed and approved by the court or judge thereof, and conditioned for the payment of the sum therein mentioned to the defendant if it shall be adjudged that

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such emergency did not exist or that the plaintiff created, or connived at its creation, by neglect or otherwise."

The complaint in the cause alleged that plaintiff is the owner of certain lands, had been in possession thereof for more than twelve years, and had placed thereon valuable improvements. Further, that he had approximately two thousand head of sheep, then in the process of lambing, herded and pastured on the land. That defendant, with full knowledge of the conditions, claimed the right of possession of the land, had entered thereon and was plowing up a portion of the same, destroying the grass, and threatened to continue so to do, and to thus interfere with the process of the lambing of the sheep. The complaint was supported by the affidavits of two other persons in substance containing the same allegations as those set out in the complaint.

The temporary writ was issued on May 3rd, 1919, but no hearing was had in the case until August 4th, 1919. At such hearing it was disclosed that the real matter in dispute between the parties was the right of possession of the land, which difference arose because the locations of section lines in that locality are in dispute. That matter, however, is not now here for consideration.

From the record it is manifest that there was no abuse of discretion by the trial judge in issuing the temporary order. The showing made was ample to support the issuance of such writ. As to probable cause for belief that defendant intended to oust plaintiff from the land it appears from the testimony that he had demanded possession, that he knew of the condition of plaintiff's sheep at the time, and that he had threatened to use force if plaintiff failed to vacate immediately. It also appears that defendant actually plowed up some of the land, destroying the pasture upon which the sheep were dependent, and that he threatened to continue until all the grass should be thus destroyed. Upon this state of facts plainly an emergency existed for which the issuance of a temporary restraining order was a proper and legitimate remedy. The denial of

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judgment on the bond was, therefore, proper and abundantly justified, and should be affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE ALLEN concur.

No. 9904.

BURGESS v. COLE.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Action by real estate broker for commission. Judgment for plaintiff.

Affirmed

On Application for Supersedeas.

1. PRINCIPAL AND AGENT—*Real Estate Broker—New Deal.* Where a real estate broker produced a buyer to whom a sale was made, the fact that the price paid was lower than first suggested does not constitute a new deal brought about solely by the owner, whre all the property listed was not included in the deal.

2. *Real Estate Broker—Commission.* Where there is no agreement as to the amount to be paid a real estate broker for his services, a reasonable compensation is the rate prevailing among local agents.

3. APPEAL AND ERROR—*Findings and Judgment on Conflicting Evidence.* Findings of fact determined on ample, competent testimony and the judgment entered thereon, will not be disturbed on review.

Error to the District Court of Routt County, Hon. Clarence J. Morley, Judge.

Mr. JOSEPH K. BOZARD, for plaintiff in error.

Mr. A. M. GOODING, for defendant in error.

MR. JUSTICE BAILEY delivered the opinion of the court.

THIS action was brought for recovery of a commission said to be due plaintiff, John W. Cole, from defendant A. C.

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Burgess, for negotiating the sale of certain ranch and personal property for the latter. Trial was to the court, with judgment for plaintiff. Defendant brings the cause here for review and seeks to have the writ of error made a supersedeas.

It appears that Cole is a real estate agent, and that Burgess offered to sell his ranch, with certain personal property, for $20,000.00, and, according to the testimony of Cole, offered to pay Cole "a good commission" should the latter find a buyer. Cole thereupon produced a person who bought the ranch and a part of the personal property, although not at the precise price or upon the exact terms first proposed. Burgess then tendered $50.00 to Cole in payment for his services, claiming that such sum was the agreed compensation. Cole disputed this and asserted that the agreement was that he should receive "a good commission." Evidence was introduced to show that five per cent of the purchase price of the property was a reasonable and usual commission, and Cole recovered $850.00, being such per cent of the sale price.

It is admitted that the sale was made to the person produced by Cole. It is true that the price was lower than that first suggested, but this is explained by the fact that only a portion of the personalty at first included was covered in the final transaction. This circumstance in no sense constitutes a new deal, as is contended, brought about solely by Burgess himself. *McCampbell v. Cavis*, 10 Colo. App. 242, 50 Pac. 728; *Carson v. Baker*, 2 Colo. App. 248, 29 Pac. 1134; *Knowles v. Harvey*, 10 Colo. App. 9, 52 Pac. 46; *Geiger v. Kiser*, 47 Colo. 305, 107 Pac. 267.

The only question to settle is whether there is sufficient competent testimony to support the findings. The testimony as to an agreement for payment of commission is in direct conflict. Burgess and his wife testified that Cole agreed to accept $50.00 as commission. Cole testified that the only agreement was that he was to be paid "well." That he was to receive "a good commission." The court having found that issue in favor of plaintiff, nothing remained to be

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done but to determine the amount to be awarded. This was fixed at the usual rate prevailing among local agents, as shown by the evidence, which is in law held to be a reasonable compensation, and controlling in the absence of special agreement. 9 C. J. 580.

The questions are of fact, were all determined upon ample competent testimony in favor of plaintiff, and the judgment entered thereon, under our well settled rule, should not be disturbed on review.

Supersedeas denied and judgment affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE ALLEN concur.

No. 9657.

COLLINS v. THE PEOPLE.

Decided November 8, 1920. Rehearing denied January 10, 1921.

Plaintiff in error was convicted of burglary.

Affirmed.

1. CRIMINAL LAW—*Burglary and Larceny.* Where an information charges both burglary and larceny, there may be a conviction of burglary only.

2. *Burglary—Ownership of Property.* In a criminal trial where it is shown by the people's evidence that the property burglarized was the home of the two persons alleged in the information to be the owners, it is immaterial who held the legal title, and it was not error to exclude testimony offered for the purpose of proving title.

3. *Information—Verification.* An affidavit attached to a criminal information, which recites that affiant "has read the foregoing information and knows the contents thereof and that the facts stated therein are true of his own personal knowledge", is sufficient.

4. *Possession of Recently Stolen Goods.* Proof that a burglary was committed, that goods were then and there stolen and

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shortly thereafter found in the possession of the accused, will sustain a conviction.

5. *Evidence—Offense Charged to Another than Defendant.* It is not admissible to show that another person has been informed against for the offense with which the defendant is charged.

Error to the District Court of Summit County, Hon. Francis E. Bouck, Judge.

Mr. KARL A. KAISER, Mr. WILLIAM C. ROBINSON, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. FORREST C. NORTHCUTT, assistant, for the people.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THE plaintiff in error was convicted of burglary. He was tried upon an information containing four counts. The first count charged him with the crime of burglary, committed with force; the second charged burglary without force; the third larceny; and, the fourth charged receiving stolen goods. The verdict of the jury found the defendant guilty as charged in the second count.

Where an information charges both burglary and larceny, there may be a conviction of burglary only. 9 C. J. 1092; *State v. Burdett,* 145 Mo. 674, 47 S. W. 796. There is, therefore, no merit in the contention that "because the jury did not find the defendant guilty of larceny, he could not be convicted of burglary."

The premises alleged to have been burglarized are described in the information as an "unoccupied dwelling-house," and the ownership is laid in two persons. The court refused to permit the defendant to introduce evidence as to "who owned the property," and this is assigned as error. It was previously shown by the people that the house was the home of the two persons, who were husband and wife respectively. To preclude variance between pleading and proof, it was not necessary that the proof show the

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legal title to be in the person or persons in whom the ownership is laid, in the information. *Sloan v. People*, 65 Colo. 456, 176 Pac. 481. It was immaterial who held the legal title, and there was, therefore, no error in the ruling complained of.

The plaintiff in error, as stated in his brief, "attacks the order of the court denying the defendant's motion to quash the information and (the attack) is based chiefly on the point that the information is not verified and that no affidavit was filed in support of it as required by law." It is not disputed that the offenses are properly described in the information. Attached to the information is an affidavit which, in addition to formal parts, recites that the affiant "has read the foregoing information and knows the contents thereof, that the facts stated therein are true of his own personal knowledge." This was sufficient, under the holding of this court in *Ausmus et al. v. People*, 47 Colo. 167, 107 Pac. 204, 19 Ann. Cas. 491. The contention in the instant case is practically the same as that made in *Moynahan v. People*, 63 Colo. 433, 167 Pac. 1175. In that case the Ausmus case was followed and held decisive, and so it must be in the instant case. See also *People v. Dist. Court*, 60 Colo. 1, 152 Pac. 149.

It is conceded that a burglary of the unoccupied dwelling-house, above mentioned, had taken place on or some time shortly prior to December 4, 1918. The evidence is amply sufficient to show that goods were then and there stolen. The evidence connecting the defendant with the burglary, consists of his possession of certain of such goods, and he now contends that a conviction cannot be sustained on such evidence alone. The cases bearing on this contention are not harmonious. 9 C. J. 1082, 1083. The weight of authority, however, sustains the proposition that proof that a burglary was committed, and that goods were then and there stolen, and shortly thereafter found in the possession of the accused, will sustain a conviction. See cases collected in note, 12 L. R. A. (N. S.) 211, and in 9 C. J. 1083.

A part of the stolen goods were found in a house not oc-

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cupied by the defendant but which had been occupied by him at and after the time of the burglary. The defendant contends that it was error to admit evidence of this fact, because such goods were not found in his possession. There was sufficient other evidence in the case from which the jury could infer that the defendant placed the goods where they were found. The evidence objected to was, therefore, admissible. 9 C. J. 1080; *McDaniel v. State,* (Tex. Cr. App.) 37 S. W. 324.

It is further contended that it was error for the trial court to strike out testimony to the effect that the wife of the defendant had been informed against for the larceny of the goods involved in this prosecution. There is no merit in this contention. It is not admissible to show that another person has been informed against for the offense with which the defendant is charged.

An examination of other points raised discloses no error. The judgment is affirmed.

MR. JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 9871.

LAWSON v. WHITLEY.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Action to restore lien of trust deed released by mistake. Judgment for plaintiff.

Affirmed.

1. REAL PROPERTY—*Trust Deed—Release by Mistake.* The beneficiary under a trust deed released her lien and took a new trust deed in ignorance of an intervening judgment lien not disclosed by the abstract of title. In these circumstances she was not guilty of any negligence which would bar her or her successor in interest from relief in equity.

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2. EQUITY—*Restoration of Legal Rights.* When legal rights of parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new right acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons.

3. REAL PROPERTY—*Restoration of Mortgage Lien.* The release of a mortgage in ignorance of an intervening judgment is generally held in equity to be a mistake, and the lien of the mortgage will be restored where it is shown that complainant was not guilty of negligence.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. THEODORE H. THOMAS, Mr. J. I. HOLLINGSWORTH, for plaintiff in error.

Mr. JOHN D. MILLIKEN, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is a suit in equity for the restoration of the lien of a certain deed of trust which, it is alleged, was released of record by mistake.

In 1911 one Nelson G. Lawson executed a certain deed of trust to the public trustee, for the use of Nellie S. Ruffner, to secure the payment of a note of $1250.00 with interest. In 1913 John L. Lawson, the plaintiff in error, recovered a judgment against Nelson G. Lawson, and caused the judgment to become a lien on the latter's interest in the real estate conveyed by the deed of trust. In 1917, and after the maturity of the note, Nelson G. Lawson paid $250.00 and the interest due on the note. He then executed a new note for the balance of the principal of the old note. To secure the payment of the second note, representing the original debt, he executed a new deed of trust, and the first deed of trust was duly released of record.

The decree awards to the second deed of trust a priority of lien as against the judgment. The judgment lienor brings the cause here for review, seeking a reversal of the

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decree principally upon the ground that it is against the law and the evidence.

The record shows that Nellie S. Ruffner caused the first deed of trust to be released without having any actual knowledge of the intervening judgment of John L. Lawson, and because of this mistake, placed her security, thereafter represented by the second deed of trust, in subordination to the judgment lien. The mistake was due to the fact that she, in the transaction involving the release, relied upon an abstract of title to the real estate affected by the liens in question, and owing to the fault of the abstractor, the abstract made no mention of the judgment or judgment lien. Under these circumstances she was not guilty of any negligence which bars her or her successor in interest, the plaintiff below, from relief in equity. *Capitol Nat. Bank v. Holmes*, 43 Colo. 154, 95 Pac. 314, 127 Am. St. Rep. 109, 16 L. R. A. (N. S.) 470; *Strehlow v. Fee*, 36 N. D. 59, 161 N. W. 719. The plaintiff was entitled to relief upon the principle, stated in the Colorado case above cited as follows:

"When the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new right acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons."

In 19 R. C. L. 472, citing *Capitol Nat. Bank v. Holmes, supra*, it is said:

"The release of a mortgage in ignorance of an intervening judgment or suit is generally held in equity to be a mistake, and the lien of the mortgage will be restored where it is shown that the complainant was not guilty of negligence."

The judgment lien holder did not change his position in reliance upon the release further than to bid in the property at his execution sale. The decree sets aside the sale, and also vacates the satisfaction of the judgment. By the provisions of the decree the judgment lien holder is placed in

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the same position he occupied prior to the release. *Strehlow v. Fee, supra.*

The judgment is affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BAILEY concur.

No. 9898.

DICKENS ET AL. v. BARNHAM.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Action against parents and child for personal injuries resulting from the latter's use of a deadly weapon. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

1. PARENT AND CHILD—*Liability for Damages.* A father may be liable for the tortious acts of his minor child, on the ground that his own act in permitting the child to have access to some instrumentality potent for mischief is, in view of the child's want of capacity properly to manage it, the proximate cause of the injury.

2. TRIAL—*Questions for Jury—Negligence and Proximate Cause.* In an action against a father for personal injuries inflicted by his minor son, the questions of negligence and proximate cause are for the jury.

3. PARENT AND CHILD—*Negligence—Damages.* Under the rules of negligence a parent is liable for an injury resulting from his child's use of a deadly weapon, if he ought to have foreseen that the infant might use the weapon negligently, or in a manner dangerous to others.

Error to the District Court of Boulder County, Hon. George H. Bradfield, Judge.

Mr. JACOB S. SCHEY, Mr. JOHN F. REYNES, for plaintiffs in error.

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Messrs. RINN & ARCHIBALD, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action to recover damages for personal injuries resulting from the alleged negligence of the defendants Lloyd Dickens, a minor, and William A. Dickens and Hannah Dickens, the parents of Lloyd Dickens. The plaintiff below recovered a judgment against two of the defendants, the father and the son, and such defendants have sued out this writ of error and apply for a supersedeas.

The plaintiff, Henry E. Barnham, was injured by a flying bullet, alleged to have been discharged from a rifle fired by the defendant Lloyd Dickens, who was at that time an infant of the age of eight years. The bullet struck the plaintiff about an inch in front of the right ear and passed through brain tissue and through the eye ball. It is not disputed that upon the occasion of the plaintiff's injury, Lloyd Dickens was carelessly and negligently firing an automatic repeating rifle, and that as a consequence of such conduct the plaintiff was struck and injured by a stray bullet. There is ample evidence to support the verdict as against the defendant Lloyd Dickens, and any question as to the sufficiency of such evidence, to sustain a judgment against him, does not merit discussion.

The main question to be determined is, Does the evidence support the verdict and judgment against the defendant William A. Dickens, the father of Lloyd Dickens?

The judgment against the father is sought to be upheld on the theory that the evidence shows that he was guilty of negligence in connection with the circumstance that the son obtained possession of the rifle, and ammunition therefor, and used the same with the result already noted, and that such negligence was the cause of the injury. As evidence tending to show such negligence, there was testimony to the following effect:

At all times herein mentioned, William A. Dickens and his family resided in a dwelling located a quarter of a mile distant from the city limits of Longmont, in Boulder Coun-

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ty, and about a hundred yards from an extensively traveled public highway. The family consisted of a wife and five children, the latter being aged, respectively, about 14, 10, 8, 7 and 6 years. On the afternoon of May 11, 1919, Lloyd, aged 8, was left alone on the premises, as he had been at other times. It was on that occasion that the plaintiff was struck by a stray bullet, while he was walking on the highway above mentioned, and, as hereinbefore noted, the bullet came from a rifle fired by Lloyd.

The rifle in question was one purchased by William Dickens, Jr., another son, aged 14. It was purchased with the father's consent, about one or two months prior to the date of the accident. Some time after it was brought home, William, Jr. showed Lloyd how to load and discharge the rifle, and allowed him to fire it once. Prior to, and at the time that the rifle was purchased, the father and his son William kept upon their premises at their home another rifle which, on at least one occasion, was used by Lloyd. It was kept in a barn; was not concealed from Lloyd; and he knew it was there. For a time after its purchase, the new rifle was also kept in the barn. Then the father instructed William "to take it some place else" because, as Lloyd testified, "it was too good a gun to leave laying around in the barn." The following is the testimony of the father as to why the new rifle was not kept in the dwelling house: "Well, William got the gun and put it in the barn. I seen the gun there, and I says 'It is too dirty to keep a good gun there.' I says, 'Put it in a better place,' and he did, or at least the gun was removed, and I presume he took it away." The father entrusted the care of the new rifle entirely to his son William. The new rifle was placed in a bunk-house. Lloyd testified that he saw William "take it in there." He knew it was being kept there. The bunk-house was not locked. Lloyd and the other children sometimes played in it. When Lloyd was left alone at home on the afternoon of May 11, 1919, the bunk-house was unlocked and its interior was accessible to him. On that occasion he went into the bunk-house to look for the

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rifle and to take it out. He found the rifle on a shelf; at the same time he found three boxes of shells, the ammunition for the rifle, on the same shelf. It thus appears that both the rifle and the ammunition were accessible to him, for he had but little difficulty in obtaining possession of the same. The rifle was of a high power character, and capable of killing a human being at a considerable distance. Neither the rifle nor the ammunition was placed or kept where it could not be taken and used by the younger children in the family. The father made no effort to learn how or where the rifle was kept; he simply allowed William "to take care of it." He took no means to make the dangerous weapon inaccessible to the younger children except that, if we take his testimony, he said to William: "Don't have any of the children shoot it or take care of it in any way at all."

It is not necessary to detail further evidence. What has been hereinabove recited, together with reasonable inferences which may be drawn therefrom, is, in our opinion, sufficient to support a verdict and a judgment against the father, the defendant William A. Dickens. The jury could find, from the evidence, that he was negligent and that his negligence was the cause of the injury to the plaintiff. A father may be liable on the ground that his own act in permitting the child to have access to some instrumentality potent for mischief is, in view of the child's want of capacity properly to manage it, the proximate cause of the injury. 7 B. R. C. 33, note; 20 R. C. L. 627.

So far as legal principles are concerned, the facts of this case are analogous to those in *Salisbury v. Crudale*, 41 R. I. 33, 102 Atl. 731. In that case a father left a loaded gun under a bed. There, as in the instant case, the weapon was accessible to an infant son, and it was held that whether defendant was negligent in allowing his son to get possession of a loaded rifle, and whether such negligence was the cause of the injury, were questions for the jury. The case approvingly quotes language found in two English cases, *Dixon v. Bell*, 5 Maule & S. 198, and *Sullivan*

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v. Creed, 2 Ir. K. B. D. 317, which appear to apply the principle that a father is liable, under rules of negligence, for any injury resulting from an infant's use of a deadly weapon, if he, the father, from what he did or failed to do, ought to have foreseen that the infant might use the weapon negligently or in a manner dangerous to others. One or both of these English cases have been cited with approval in several American cases, as appears in the opinion in *Salisbury v. Crudale, supra.* In *Phillips v. Barnett,* 2 N. Y. City Ct. Rep. 20, cited in 29 Cyc. 1666, it was held that a father may be liable for the damage caused by the discharge of a pistol in the hands of his twelve-year-old son, where he has left it in an unlocked drawer in the room in which his children are allowed to play. In *Vallency v. Rigillo,* 91 N. J. Law, 307, 102 Atl. 348, the defendant negligently left dangerous dynamite cartridges in his home within easy reach of his infant child of tender years, who took them away from the house. An accident and injury resulted. It was held that a jury might find the defendant guilty of negligence. The cases above cited support our conclusion.

We find no reversible error in the record. The application for a supersedeas is denied, and the judgment is affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BAILEY concur.

No. 9939.

COLLINS v. THE PEOPLE.

Decided November 8, 1920. Rehearing denied January 10, 1921.

Plaintiff in error was convicted of the larceny of a saddle.

Affirmed.

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On Application for Supersedeas.

1. CRIMINAL LAW—*Information—Amendment During Trial.* Amendments of informations in matters of substance cannot be made at the trial, but amendments in matters of form are allowable.

   Amendments changing the name or description of the owner of property in a charge of larceny are amendments in a matter of form and allowable during the trial.

2. *Amended Information—Rearrangement and Reverification.* It is not necessary to rearraign the defendant nor to have the information reverified after allowable amendment during the trial.

Error to the District Court of El Paso County, Hon. Arthur Cornforth, Judge.

Mr. SAMUEL H. KINSLEY, for plaintiff in error.

Mr. VICTOR E. KEYES, Attorney General, Mr. CHARLES H. SHERRICK, Assistant, Mr. T. C. TURNER, for the People.

MR. JUSTICE ALLEN delivered the opinion of the court.

THE plaintiff in error, defendant below, was convicted of larceny. He has sued out a writ of error, and the cause is before us upon his application for a supersedeas.

The information to which the defendant pleaded and upon which the trial was begun, charged the defendant with the larceny of "the personal goods and chattels of Mrs. C. C. Hamlin, to-wit, three saddles."

At the trial, the first witness for the people was Mrs. C. C. Hamlin, the person whose property was alleged to have been stolen. She testified that four saddles were stolen from a garage, one belonging to Mrs. Gunnell, one to Mr. Hamlin, one to "Dr. Swan or his daughter," and the fourth to herself. Two of the saddles were in the court room as exhibits, and the witness identified one as the property of Mrs. Gunnell and the other as the property of Mr. Hamlin. Thereupon counsel for the people moved to amend the information so as to charge larceny of only one saddle and lay the ownership of the same in C. C. Hamlin. The mo-

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tion was granted, over the objections of the defendant, and the information was accordingly amended.

One of the questions presented by the record for our determination, is whether the information, in respect to the allegation of ownership of the property, could lawfully be amended, at the time and in the manner it was permitted by the trial court to be amended.

As above noted, the information was amended after the trial had begun and after the first witness had given her testimony. If the amendment was one of substance, and not merely of form, it was made too late. Amendments of informations in matters of substance cannot be made at the trial, but amendments in matters of form are allowable. 22 Cyc. 437; 14 R. C. L. 193, sec. 38; 12 Standard Enc. Proc. 556.

The amendment in question did not change the offense. The amended information charged the same offense as the original information. In *State v. Bell*, 65 N. C. 313, it is said:

"The name of the owner of property stolen is not a material part of the offense charged in the indictment, and it is only required to identify the transaction, so that the defendant by proper plea may protect himself against another prosecution for the same offense."

It has generally been held that amendments changing the name or description of the owner of property in a charge of larceny, are amendments in a matter of form, and allowable during the trial. 22 Cyc. 441. In *State v. Bright*, 105 La. 341, 29 So. 903, the court held an amendment properly allowed which changed not merely the name but also the identity of the person in whom the ownership of the property was laid.

In our opinion there was no error in permitting the amendment to be made.

The remaining questions relate to rearraignment of the defendant and to the reverification of the information. It was not necessary to rearraign the defendant, nor to have the information reverified, after the amendment in question

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was made. No error was committed in these matters.

The application for supersedeas is denied, and the judgment is affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BAILEY concur.

No. 9673.

WHITESCARVER v. WALDO.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Action on promissory note. Judgment for plaintiff.

Reversed.

1. BILLS AND NOTES—*Promissory Note—Release of One of Several Makers.* The release of one of two or more joint, or joint and several obligors or promisors, operates to release the others.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

MR. GEORGE B. CAMPBELL, MR. HARRY C. RIDDLE, for plaintiff in error.

MR. GEORGE F. DUNKLEE, MR. EDWARD V. DUNKLEE, for defendant in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiff in error, with A. M. Stevenson and L. C. Greenlee, was sued by defendant in error, Waldo, on a promissory note. The trial court directed a verdict in favor of Stevenson and Greenlee, upon the ground that the note in suit was signed by Stevenson and Greenlee upon the mistaken assumption that it was being executed pursuant to an agreement with The Ajax Wyoming Oil Com-

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pany, of which all these parties were directors. Judgment was entered against plaintiff in error and he has brought the case here for review. He contends that under the well settled rules of law the dismissal of the suit as to the two defendants named inured to his benefit; that is, that their release, by the judgment of the court, released him also; hence, he says the court erred in not dismissing the action as to him. To this contention defendant in error replies that the note is a joint and several obligation by the terms of our statute, and therefore, he says, the release of the two defendants had no effect upon the liability of plaintiff in error.

The question has been determined by this court in accord with the contention of plaintiff in error. In *Heckman v. Manning*, 4 Colo. 543, it is said:

"The doctrine that a release of one of two or more joint, or joint and several obligors or promisors operates to release the others, is a common-law rule which has been so long and well settled in its application by the courts of this country, as to be elementary." Citing *Benjamin v. McConnel*, 4 Gilm. (Ill.) 545; *Tuckerman v. Newhall*, 17 Mass. 581.

The Illinois case cited was similar to the instant case in the fact that the release was by judgment of the court, as in this case.

In the Massachusetts case the court points out that the rule in question applies equally well to joint, and joint and several obligations.

In Vol. 8, p. 276, Bouvier's Edition of Bacon's Abridgment, it is said:

"If two or more are jointly and severally bound in a bond, a release to one discharges the others; and in such case the joint remedy being gone, the several is so likewise."

The rule is again recognized in *Hochmark v. Richler*, 16 Colo. 263, 26 Pac. 818. The basis of the rule, as stated by the authorities, is that the discharge of one "disturbs the equality of burden created by the obligation."

It is urged, however, that the liability of plaintiff in

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error is fixed by Exhibit "E", a writing signed by Whitescarver in which he agrees to give Waldo an interest in an option on a further issue of stock in the Oil Company. It closes as follows:

"But it is understood that the real consideration for the note of $7500 was that we received that amount in cash from C. A. Waldo at time note was given to the undersigned Mr. Charles A. Whitescarver, and also that he is personally liable for loan."

Waldo testified that the exhibit was signed and given to him before the execution of the note and the delivery of the check. This is in conflict with the language of the instrument which speaks of the loan, the giving of the note, and the receipt of the money as past transactions.

Treating this as an admission by Whitescarver of liability on the note, it is far from an admission that he was liable *alone*. If, as Waldo claims, this was a part of a single transaction, then the liability which Whitescarver thus admits must be held to be the liability on the note, which liability was shared by his co-makers. This is conclusively shown by plaintiff's own evidence.

Plaintiff's Exhibit "D" is a copy of a statement made by Whitescarver to his bank in February, 1918, as a basis of credit. Waldo's testimony shows that at his request the copy was made, and to it was attached the following:

"Denver March 9 1918

To C. A. Waldo in order to induce you to make a loan of $7500 to myself and L. C. Greenlee and A. M. Stevenson, I make or renew the within statement to you of my personal standing.

(Signed) C. A. Whitescarver."

Waldo testified that he told Whitescarver that if Greenlee would join in the note he would consider making the loan; also that previous to the signing of the note he said to Whitescarver, Greenlee and Stevenson that he would loan them personally, but would not loan anything to the company, and that thereupon they signed the note. He says that they agreed to sign it as "a joint note, all three of them."

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He testified further that he concluded to make the loan after he had Whitescarver's bank statement, and after Whitescarver had told him that Greenlee and Stevenson would sign the note with him. It being thus evident that the loan was made, not to Whitescarver alone, but to the three makers of the note, it is clear that Whitescarver could not have intended to admit, nor could Waldo have supposed him to admit, any liability other than that with his two co-makers of the note. That liability was discharged by the judgment in favor of the other makers of the note. If by signing the exhibit he created another and different liability, the contract must be upon a consideration, and if valid in that respect, it forms a different cause of action.

For the reasons above stated, the judgment is reversed and the cause remanded to the district court with instructions to dismiss the suit.

MR. JUSTICE BAILEY and MR. JUSTICE SCOTT not participating.

No. 9684.

THE BURLINGTON GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION.

THE BURLINGTON GAS & ELECTRIC CO. *v.* THE TOWN OF BURLINGTON.

THE THOMAS S. HAYDEN REALTY CO., Intervenor.

Decided Nov. 8, 1920. Rehearing denied Jan. 10, 1921.

Proceeding before the Public Utilities Commission involving the authority of a municipality to erect and operate a lighting plant. Finding in favor of the municipality.

Affirmed.

1. PUBLIC UTILITIES COMMISSION—*Finding of Fact.* A finding of fact by the public utilities commission which is justified by the

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evidence, will not be disturbed on review by the supreme court.

Writ of Review to the Public Utilities Commission.

MR. WILLIAM R. EATON, MR. RICHARD PEETE, for petitioner.

No appearance for respondents.

MR. JUSTICE TELLER delivered the opinion of the court.

THIS matter is before us to review an order of the Public Utilities Commission. The petitioner was the owner of the gas plant in the Town of Burlington, this state, and complained to the Public Utilities Commission that the City of Burlington had, under an ordinance providing for a bond issue for the purpose of extending the water system of the town, constructed and put into operation an electric light plant, and was in competition with the petitioner in the matter of furnishing light.

The petitioner claimed that the Town of Burlington had not complied with Chapter 10 of the Laws of 1917, which requires that a public utility shall thereafter obtain from the commission a certificate that public convenience and necessity require the exercise of the right or privilege claimed by the utility. The case turned upon the time at which the work on the municipal lighting plant was begun. The petitioner alleged that, while the work on the pumping plant antedated the going into effect of the Law of 1917, the lighting plant was begun after the law became effective. Upon this question the commisson heard testimony and found in favor of the Town of Burlington. An examination of the evidence shows that the commission's finding was fully justified; that being so the finding must stand and the order of the commission is therefore affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE DENISON concur.

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No. 9700.

THE STATE BOARD OF MEDICAL EXAMINERS v. BOULLS.

Decided November 8, 1920.

Certiorari to the state board of medical examiners. The district court reversed the action of the board.

Reversed.

On Petition for Rehearing February 7, 1921.

1. CERTIORARI—*Question to be Determined.* The only question to be determined on a writ of certiorari, is whether the inferior tribunal or board has exceeded its jurisdiction, or greatly abused the discretion allowed it.

2. PHYSICIANS AND SURGEONS—*State Board of Medical Examiners.* The decision of the state board of medical examiners, on a question within its jurisdiction, will not be disturbed on writ of certiorari.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. VICTOR E. KEYES, Attorney General, Mr. CHARLES H. HAINES, for plaintiff in error.

Mr. JOHN HIPP, Mr. J. M. PRIEST, for defendant in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

THIS cause is before us on error to the district court of the City and County of Denver to review a judgment entered on a writ of *certiorari* to the State Board of Medical Examiners, which judgment reversed the action of the Board in refusing to the defendant in error a license "to practice chiropractic." For the plaintiff in error it is urged that the trial court was, and this court is, without jurisdiction to consider the merits of the case; this for the reason that the only question to be determined on a writ of

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certiorari is whether the inferior tribunal, or board, has exceeded its jurisdiction, or greatly abused the discretion allowed it.

This contention is sustained by repeated rulings of this court.

Thompson v. State Board, 59 Colo. 549, 151 Pac. 436; *State Board v. Noble,* 65 Colo. 410, 177 Pac. 141.

The statute under which the defendant in error applied for a license made the State Board of Medical Examiners a tribunal to determine whether or not he came within the provisions of the law. Defendant in error was allowed a hearing upon the matters involved, and the determination of the question presented to the board was within its jurisdiction. Its decision is, therefore, not to be disturbed on writ of *certiorari.*

The judgment is accordingly reversed and the cause remanded with instructions for further proceedings in harmony with the views herein expressed.

MR. JUSTICE WHITFORD not participating.

No. 9322.

TERRACE IRRIGATION DISTRICT, ET AL. v. OVERFLOW DITCH NO. 1, ET AL.

Decided February 7, 1921.

Action to enjoin diversion of water on account of abandonment. Judgment for plaintiffs.

Affirmed in Part and Reversed in Part.

On Petition for Rehearing.

1. PLEADING—*Parties—Waiver.* An objection on the ground of defect in parties plaintiff is waived by answer.

2. WATER RIGHTS—*Abandonment—Decree.* A decree enjoining diversion of a part of an appropriation of water is valid as to the

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parties to the proceeding, and in this case is not invalid because it fails to specify on whom the loss of the abandoned portion should fall, that being a question to be settled in another suit.

3. *Abandoned Water Right—Innocent Purchaser.* A water right being intangible, when abandoned has no existence in fact or theory.

There can be no such thing as an innocent purchaser of an abandoned water right.

Error to the District Court of Conejos County, Hon. W. N. Searcy, Judge.

Mr. JOHN R. SMITH, Mr. GEORGE M. CORLETT, Mr. RALPH L. CARR, for plaintiffs in error.

Mr. JOHN T. ADAMS, Messrs. GOUDY, TWITCHELL & BURKHARDT, Mr. FRANK B. GOUDY, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THIS was a suit by defendants in error to enjoin the diversion of certain water on account of abandonment. The court found for plaintiffs that certain rights claimed by defendants in the Gomez, Jose Maria Valdez, T. K. Walsh, Lovett and Walsh ditches had been partially abandoned. Defendants come here on error. There was a cross bill alleging abandonment of certain rights claimed by plaintiffs in the Lowland and Overflow No. 1 ditches and on this point also the court found for plaintiffs and error is assigned thereon. There were other rights in question, but it is not necessary to notice them.

We will first consider the Gomez ditch.

By the original decree in water district 21, this ditch was awarded 4.62 second feet as of August 1, 1867. There was evidence tending to show that not more than two second feet had been used for many years and other evidence tending to show abandonment of all over that amount. The court found that all over two second feet had been abandoned and enjoined the further diversion of any above that amount. We are not willing to disturb that finding.

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Gomez, the original appropriator, had sold 3½ of his original 4.62 second feet, and the defendant, The Terrace Irrigation District, through several mesne conveyances, had acquired it, and now insists that no valid decree could be rendered declaring an abandonment of any portion of this priority unless the present owner of the remaining 1.12 second feet were a party, and that no valid decree was rendered because it was not decided on whom the loss of the abandoned portion of the priority should fall.

We think neither of these points is well taken, because a defect of parties is waived by answer, which leaves the decree in this case valid as to the parties even if not as to others, and because the present decree enjoins the diversion merely, and does not purport to decide to whom the water rights belong, which leaves disputes as to ownership of the remaining two second feet to be settled in other suits.

As to the Gomez ditch, then, the decree should be affirmed.

As to the Jose Maria Valdez ditch the evidence of abandonment is much stronger, indeed a prior adjudication of abandonment of all but 5.2 second feet has been affirmed in this court, 42 Colo. 178, 93 Pac. 1115. This amount of water, 5.2 second feet, is left intact by the decree now before us.

The plaintiffs in error claim to be innocent purchasers, but, since the records of the court of original jurisdiction and of this court bear a decree which declares abandonment by their predecessors in title, and since we find no allegation in the pleadings and no evidence that they did not know of this decree when they purchased, we cannot say they were innocent. *Bassick M. Co. v. Davis*, 11 Colo. 130, 134, 17 Pac. 294. There is no statute requiring the filing of such a decree in the office of the county clerk. The record of a transcript of the judgment docket, to secure a lien, is quite another matter. Furthermore, we do not think there can be such a thing as an innocent purchaser of an abandoned water right. Tangible things, though abandoned, still exist, but a water right, intangible, once abandoned, has no existence in fact or theory. Whether a

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junior appropriator can be estopped by conduct to assert an abandonment against one who has purchased an abandoned senior right and expended money in the belief that it was not abandoned, is another question, upon which we express no opinion.

A question arises in regard to this ditch similar to that in regard to the Gomez ditch above, *i. e.*, On whom should the loss, caused by the decree of abandonment, fall? But here, as there, we think the question is not before us but must be settled in another proceeding.

As to the Lovett ditch, Walsh ditch and T. K. Walsh ditch a majority of the court is of the opinion that there is not sufficient evidence of abandonment to justify the finding of the court below, and, with respect to those ditches, therefore, the judgment should be reversed. On this point Mr. Justice Burke and the writer do not agree with their colleagues.

We do not disturb the findings of the court as to the Lowland, the Overflow No. One or the New Union Ditch, because there is sufficient evidence in the record to support such findings.

With reference to the criticism by counsel of the motives of their opponents in preparing an insufficient abstract, we suggest that such are irrelevant to the issues before the court, and call attention to the case of *Manning v. The People,* 180 Pac. 748, S. C. 66 Colo. 249-252.

The judgment is affirmed as to all matters except the Lovett, Walsh and T. K. Walsh ditches; as to them it is reversed, with directions to enter judgment for defendants in accordance with these findings.

MR. JUSTICE TELLER not participating.

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No. 9411.

THE COLORADO IRRIGATION CONSTRUCTION CO., ET AL. *v.* THE NILE IRRIGATION DISTRICT.

Decided Dec. 6, 1920. Rehearing denied Jan. 10, 1921.

Action by irrigation district on contractor's bond. Judgment for plaintiff.

Affirmed.

1. IRRIGATION DISTRICTS—*Contracts.* Section 11, chap. 113, S. L. 1905, relative to the authorization and ratification of irrigation district contracts by electors of the district, applies to modifications of, as well as to original contracts, and a modification of an executed contract involving a consideration in excess of twenty-five thousand dollars, without such authority and ratification, renders the contract void.

2. *Void Contract—Acceptance of Work Under.* Acceptance of work by an irrigation district board under a void contract, is without effect.

3. BONDS—*Principal and Surety—Liability.* Principal and surety are liable on a contractor's bond where the conditions are not met, nor the work contemplated by the contract performed according to its terms.

4. INTEREST—*On Amount Due Under Bond.* A party is entitled to interest on the amount due under a bond, from the date of notice of default and demand of payment.

Error to the District Court of Morgan County, Hon. Charles Cavender, Judge.

Messrs. BARDWELL, HECOX, MCCOMB & STRONG, Mr. JOHN R. SMITH, Mr. PERRY D. ROSE, for plaintiffs in error.

Messrs. MELVILLE, MELVILLE & WALTON, Mr. WALTER S. COEN, Mr. H. L. SHATTUCK, for defendant in error.

Mr. DELPH E. CARPENTER, *amicus curiae.*

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

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THE defendant in error brought suit against the plaintiffs in error on a bond, executed by the Construction Company as principal and the Surety Company as surety, conditioned upon the faithful performance of a contract between the Construction Company and the defendant in error for the construction of a district irrigation system.

On trial to the court plaintiff had judgment for $100,000, the penalty named in the bond, and the case is now here on error.

It appears from the record that in June, 1909, the parties entered into the contract in question, which was thereafter submitted to the electors of the district under the statute and approved by them. It provided for the construction, within twenty months after such approval, of a complete irrigation system, consisting of eight storage reservoirs, intakes and outlets, etc. It was to have a storage capacity of 35,000 acre feet.

Up to March 31, 1911, when the time allowed for the completion of the system expired, the only work which had been done was the making of borings, the preparation of maps, and some other preliminary work. In April, 1912, the district board, having theretofore made an ineffectual effort to induce the Construction Company to proceed with the work, agreed with said company to a modification of the contract. Such modification was made, the contract thus modified was assigned to one Lucas with the consent of the district board, and with the consent of the Surety Company, the latter agreeing to the continuance of its obligation. This modified contract provided for the construction of only three of the eight reservoirs, with a total capacity of about 27,000 acre feet. Thereafter, these three storage reservoirs were constructed, the district board accepted the work as complete, and paid the Construction Company the agreed consideration.

Some months thereafter, this action was begun to recover the penalty on the bond, on the ground that the Construction Company had defaulted on its contract.

Defendants in the action made several defenses which

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need not be considered. Their principal ground of contention is that the district, by the acts of its board, waived the default in the completion of the work, and in making the modified contract, it, in effect, abrogated the old contract; and, further, that the work having been completed within the time named in the modified contract, and accepted by the district board, there was no default on the part of the obligors in the bond.

Whether or not the several steps taken by the district board, after March 31, 1911, to induce the Construction Company to comply with the terms of the contract, constituted a waiver of the default, and an extension of the time, need not be determined, because it is admitted that the work as specified in that contract was never performed. The defendants must, of necessity, depend upon performance under the new and widely different contract.

The gist of the question to be determined is, was the making of the changes in the contract within the power of the district board. Defendants rely upon a provision in the original contract by which it might be modified by the mutual consent of the parties. The trial court found that the modifications made involved an expenditure in excess of $25,000 and hence were within the provisions of Section 11, Chapter 113, Session Laws 1905, which defines the powers and prescribes the duties of the board. Said section reads, in part, as follows:

"But no contract involving a consideration exceeding ten thousand ($10,000) dollars, and not exceeding twenty-five thousand ($25,000) dollars shall be binding, unless such contract shall be authorized and ratified in writing by not less than one-third of the legal electors of said district according to the number of votes cast at the last district election; nor shall any contract in excess of twenty-five thousand ($25,000) dollars be binding until such contract shall have been authorized and ratified at an election, in manner as is provided for the issue of bonds."

The contention of plaintiffs in error is that the provision in the contract for its modification by the consent of both

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parties authorized the district board to change the contract as it did. They urge, that this modification provision, having been approved by the electors as a part of the contract, the board was authorized as agents of the electors, or as the executive officers of the district, to make the modification. This is an extreme, and as it seems to us, an unreasonable view of the provision in question. The statute above cited was, in effect, read into the original contract, and the modification provision must be construed in connection with this statutory provision. If counsel's view is correct, a district board, having secured the approval of a contract containing such a provision, has thereby exempted itself from this statutory prohibition.

Clearly, it was not in the power of the district board, nor of the electors themselves, to abrogate this statute, which was intended, not merely for the protection of the electors who might vote, but for the protection of all of the proper owners in the district. Such modification provisions are common in contracts, having been found necessary to their carrying out. They contemplate only such slight changes as may be found necessary to the accomplishment of the result aimed at by the contract.

Here the new contract omitted from the plan, which had been approved at the election, five of the eight reservoirs, and changed the line of the main canal.

The storage capacity was decreased 20%, at least. No one can say that there would have been a majority in favor of the contract had it not included all the proposed reservoirs and been substantially as it was when submitted for approval. It must be presumed that the consent of the electors to the incumbrance of their lands was given because they considered the proposed system sufficient to irrigate the district to an extent that justified the imposition of the resulting burden. *Non constat* that a smaller or otherwise different system would be regarded as sufficient to render it advisable to assume the original, or any other obligation. The electors, being presumed to know the law, must be presumed to have known that the power to

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modify the contract was limited by the statute. If the board can modify contracts to any extent because of such provision for modification, or can accept contracts as complete, regardless of compliance with the terms thereof, the statute which requires the approval of contracts by electors is without force, a cause of unnecessary expense to the district, and an aid to designing and dishonest promoters, who, because of the statute, may induce property owners to consent to the burdening of their lands under the belief that the system upon which they vote will be, in all substantial matters, the system for which they will pay. The lawmakers certainly knew that directors of irrigation districts would be, for the most part, men without experience in large enterprises, subject to the blandishments of promoters and contractors; and so they inserted in the statute these limitations on the power of the board to make binding contracts.

Is it to be supposed that this careful provision to prevent the board's acting without regard to the wishes, or interests of the electors, is to apply only to the first contract proposed for the consideration of the electors? Is this protective provision *functus officio* when one contract has been ratified? Can the board, by securing the approval of a contract containing authority to modify it, render inoperative the statute as to all their subsequent dealings with the contractor? To ask these questions is to answer them. This court ought not, by its construction of a contract, to nullify a provision of the statute clearly intended to protect the landowners of irrigation districts, and without which they are at the mercy of incompetency and dishonesty.

If the contract under which the work was done, violated the statutes and was therefore void, no action of the board by way of an acceptance of the work can have any force. If such acceptance were conclusive the act of acceptance would abrogate the statute above mentioned.

Although there may be in the pleadings some confusion as to the theory of the plaintiff, the case as tried was within

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the pleadings and the matters above discussed were fully presented to, and considered by the court.

There is no error in his finding that the conditions of the bond had not been met; that the work had never been performed according to the contract, whether it was the first or the modified contract, and that in either event the surety was liable. Under the authority of *Empire Co. v. Lindenmeier*, 54 Colo. 497, 131 Pac. 437, Ann. Cas. 1914C, 1189, the plaintiff was entitled to interest from the date of notice of default, and demand of payment.

The judgment will be amended to include interest, and as so modified, it is affirmed.

MR. JUSTICE BAILEY and MR. JUSTICE DENISON dissent.

No. 9598.

MOE, ET AL. *v.* LOWRY, ET AL.

Decided Dec. 6, 1920. Rehearing denied Jan. 10, 1921.

Action for the cancellation of corporate stock alleged to have been obtained without consideration. Judgment for plaintiffs.

Affirmed.

1. JOINT ADVENTURERS—*Fair Dealing.* Each of several joint adventurers owes to the others absolute good faith, open and honorable dealing, free from deception and concealment.

2. RIGHTS AND REMEDIES—*Decree.* In an action by stockholders of a corporation against one who has obtained stock in the company without consideration, the relief granted is sufficient if there is a correct enforcement of the rights of the parties as shown by the evidence.

3. JOINT ADVENTURERS—*Secret Profit.* In the case of a secret profit by a joint adventurer, he must disgorge all that he surreptitiously acquired.

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4. *Accounting for Profits.* One of several joint adventurers who secretly receives back all that he has invested in the enterprise, is left without any interest in the joint adventure and is not entitled to share in the profits or property pertaining thereto.

5. RIGHTS AND REMEDIES—*Rescission.* While it is a corollary of the law of rescission that a party cannot retain property and also recover secret profits; if rescission is impossible, the wronged parties are not barred from all remedy, and that remedy is proper which gives them what the consideration furnished by them actually purchased.

6. ACTION—*By Stockholders of Corporation.* The rule that a stockholder must demand action by the corporation before suit, has no application in an action by stockholder against stockholder, where the company is only a nominal or formal party.

7. PLEADING—*Amendment.* A pleading may be amended to conform to the proof even to the extent of withdrawing an admission.

8. *Misjoinder.* The objection of misjoinder of parties is waived by answer.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. EDWIN H. PARK, Mr. THOMAS H. GIBSON, for plaintiffs in error.

Messrs. DANA, BLOUNT & SILVERSTEIN, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THE defendants in error were plaintiffs below and had a decree cancelling certain stock of defendant Moe in the defendant corporation, The Molybdenum Mines Company.

The material facts are as follows: One Cohen gave defendant Moe an option on certain mining property at $3,000; Moe and plaintiffs, Lowry, Deane and Jackson went in together to purchase the property, plaintiffs to pay half and take half and Moe to pay half and take half, but he told them the price was $6,000. At the time the deed was delivered and the money paid Moe carried out the deception

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by giving his check for $3,000 to Cohen, while the remaining $3,000 was paid to the latter by plaintiffs, and Moe and Cohen then immediately went to the bank where Cohen repaid to Moe in currency the amount of the check, less some small adjustments between them.

The suit was based on the above transaction, the plaintiffs taking the ground that they and Moe were joint adventurers, and that therefore he owed them absolute good faith, open and honorable dealing, free from deception and concealment. In this they were right. The cases sustaining their position, if any were needed, are very numerous. The following are some of them: *Reyer v. Blaisdell,* 26 Colo. App. 387, 143 Pac. 385; *McEwen v. Shannon,* 64 Vt. 583, 25 Atl. 661; *Gamble v. Loffler,* 28 S. D. 239, 133 N. W. 288; *Grant v. Hardy,* 33 Wis. 668; *Walker v. Pike Co. L. Co.,* 139 Fed. 609, 71 C. C. A. 593; *Getty v. Devlin,* 54 N. Y. 403; s. c., 70 N. Y. 504; *Bentley v. Craven,* 18 Beav. 75; *Shoufe v. Griffiths,* 4 Wash. 161, 30 Pac. 93, 31 Am. St. Rep. 910.

But defendant Moe claims that the decree cancelling his stock was not the proper remedy.

The mining property was conveyed to Lowry as trustee for himself, Deane, Jackson and Moe. The defendant corporation was formed, Lowry transferred the property to it, and the stock was then issued and divided, one-half to Moe and one-half to the plaintiffs in proportion to their respective payments on the purchase price. Moe's half was thus obtained without payment, consequently he got his interest in the land and his stock for nothing, and plaintiffs alone paid for it. They were, then, in equity, the sole owners of the mining claims and therefore should have been the sole stockholders. The court might have ordered the defendants to transfer the Moe stock to them and the decree could not have been questioned, but exactly the same effect was produced by the cancellation of Moe's stock, because in either case the plaintiffs are left the sole stockholders and so the whole equitable owners of the mining prop-

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erty, which is a correct enforcement of their rights as shown by the evidence.

In case of a secret profit by a joint adventurer he must disgorge "all that he surreptitiously acquired." It would be "a reproach to the law" were it otherwise. *Walker v. Pike Co. Land Co., supra.*

What did Moe surreptitiously acquire? It was the whole of his interest, because he got it for nothing, his co-adventurers paying the whole price, he falsely pretending he was paying an equal amount.

In the above case, which was essentially like the present, the court decreed a payment of the money which had been secretly taken and granted a lien on defendant's stock to secure such payment. In that case, however, his stock had been paid for by defendant and the surreptitious profit was additional thereto and in cash. Here the surreptitious acquisition is the defendant's stock. The decree compels him to disgorge it, and, in effect, gives it to plaintiffs who really paid for it. It "equitably belongs to those who have paid the money." *Getty v. Devlin,* 54 N. Y. 403, 415; s. c., 70 N. Y. 504, 511; *Grant v. Hardy,* 33 Wis. 668, 677.

It is suggested that Moe put his option into the joint adventure or syndicate, and that, when he is required to account for his surreptitious acquisitions, he should be allowed something for such option. Why? He asked nothing for it, but agreed to pay his half of the price on equal terms with plaintiffs. When caught in his deceit why should he be permitted to change front and say he ought to be paid or allowed something that the agreement did not contemplate?

It is also suggested that since the secret profits should be accounted for to the syndicate and Moe is one of the syndicate he should share in the property accounted for. That would be true if he had received back from Cohen only part of his share of the price, but when he got all back he was left with no interest in the joint adventure.

It is claimed that the plaintiffs cannot retain the property and also recover secret profits. That proposition is a

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corollary of the law of rescission, but where, as here, rescission has become impossible, the wronged parties are not barred from all remedy, and that remedy is proper which gives them what the consideration furnished by them actually purchased. The property had all been transferred to the corporation when the fraud was discovered. *Getty v. Devlin, supra.*

There is no room here for the application of the rule that a stockholder must demand action by the company before suit. This is a suit by stockholders against stockholders and the company is a nominal or formal party. Nothing is taken from it. The decree leaves it neither richer nor poorer than before.

The complaint stated that Moe had expended $98, which should be repaid to him, and tendered it. At the conclusion of the evidence the court granted plaintiff leave to withdraw this statement and tender. This grant is urged as error on the ground that the statement was a judicial admission, incontrovertible in this case. The authorities are that a pleading may be amended to conform to the proof, even to the extent of withdrawing an admission. 16 Cyc., p. 964. We do not think that the court abused its discretion on this point and therefore this was no error.

The misjoinder, if there was one, was waived by answer. *Springhetti v. Hahnewald,* 54 Colo. 383, 131 Pac. 266, and many other cases in this court.

The judgment should be affirmed.

MR. JUSTICE SCOTT, MR. JUSTICE BAILEY and MR. JUSTICE TELLER dissent.

MR. JUSTICE TELLER dissenting:

The majority opinion seems to me to misconceive the foundation of the action. While fraud is alleged this is not an action to rescind; neither is it an action for deceit, for that action can be maintained only when the plaintiff has suffered damage from the deceit. Here the plaintiffs, on an investment of $3,000, obtained a half interest in a

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property worth, by their own admission, more than $6,000.

The judgment entered is, in effect, a judgment for damages, since it penalizes Moe by taking from him *all* the stock issued to him. It gives to the other members of the syndicate the entire profits made by Moe, in a suit based upon an equitable principle that a member of a syndicate making a profit, in a matter in which all are interested, must share that profit with his associates.

The suit is properly for an accounting by Moe for profits, which, because of the fiduciary relations between the parties as joint adventurers, he ought to have shared with them. They were members of an association or syndicate, and all profits made by any member thereof belonged to the syndicate. Moe defrauded the plaintiffs not as individuals dealing with him for the purchase of the property,—since it was worth its purchase price,—but as members of an association of which he was a member. The majority opinion states that Moe put nothing into the enterprise, because, we suppose, he furnished no part of the money paid Cohen for the property. Right here is the error in the opinion. If I could agree with that statement, I would concur in the opinion. Moe owned an option on the property, i. e., the right to acquire it for $3,000. It being worth in excess of $6,000, an option at anything less than that sum was a thing of value. This option Moe contributed to the venture, and thus put in a thing of value. The property being of this value, the plaintiffs were not defrauded by the fact that they were induced to pay $3,000, for a one-half interest in it. That is not the ground of their complaint. If it were so, their remedy would be by suit to rescind. They received exactly what they bargained for, and supposed they were getting, a half interest for $3,000. Their injury lies entirely in the fact that Moe made a secret profit, which he retained, instead of dividing it with them. The reason Moe cannot keep all of this profit, as he could equitably have done had he made it with the knowledge of the other members, is that he deceived them, when he owed to them the utmost good faith.

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All that equity requires is that he share the profit, it does not justify, under the guise of an accounting for profits belonging to the association, the taking of Moe's entire interest which should include his share in the profits, and such an interest in the property as his option represented in the transaction. The stock issued to Moe represented his investment by the putting in of the option, a thing of value, and the secret profits whatever they were. To deny that he had an interest aside from the profit is to hold that the option had no value. This cannot equitably be done. An owner of an option at a price less than the value of the property optioned, has a property right whose value depends upon the difference between the value of the land optioned and the option price. If this is not clear from a view of the facts, it may be supported by precedent.

In *Masberg v. Granville*, 201 Ala. 5, 75 South. 154, it is held that a man having an option on property at a price $3,000 less than its value, had an interest in the property worth $3,000. The court said of the owners of the option:

"In truth and in fact they did have a valuable interest in the land, in that they had an option to purchase it at the price of $9500, and had paid $500 for this option or interest therein. If the land was in fact and in truth worth $12,500, then their interest was worth in truth and in fact $3,000. All of the parties and witnesses, including the complainants themselves, say the land was in fact worth $12,500, which the corporation and the complainants agreed to pay. When appellants had, with Steiner Bros., a contract for which they had paid $500, or even a gratuitous option, to purchase land worth $12,500 at the price of $9,500, the value of this contract was the property of the appellants, just as much as if the difference in price had been separate, distinct, tangible property. When the negotiations between these parties began, this difference of value was the property right of appellants, and not of appellees, nor of the corporation, for the corporation had no existence. If it amounted to $3,000, and the undisputed evidence shows that it did, then there was no more wrong in procuring the

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agreement that the corporation to be formed should pay appellants this $3,000 than there was that it should pay Steiner Bros. the $9,500."

Then follows a statement which distinguishes the case at bar, as made, from the case as supposed in the majority opinion.

"If appellants, when they obtained the option from Steiner Bros. had then been acting as the agents of the corporation, or of appellees, then the corporation, appellees, or the principal would be entitled to receive the profits or value of the option, whatever it might be. The contract and its value would be the property of the principal, and not of the agents. But no such relation existed when the option was obtained by appellants. The corporation did not exist, had not been thought of, and neither of the appellees had ever heard of the land or thought of buying it for themselves or for a corporation. When their relations and connections with the land began, the appellants were the owners of this option to purchase. * * * There is shown no reason why appellants should give this $3,000 to appellees or to the corporation."

It is undisputed that Moe had the option when he first told Lowry about the property. Again the court says:

"But surely appellants were in good faith and good conscience entitled to something for their option, if it had value, and it is conclusively shown that it had."

The Alabama case is on all fours with the instant case, except that it does not appear that appellants ever represented to appellees that they had actually paid $3,000 of the purchase price of the land. For that reason the complainants in the suit were held not entitled to recover. The case is conclusive upon the right of Moe to receive something for his option.

It is undisputed that the property was obtained through the exercise by Moe of his option, thus securing to the syndicate a $6,000 property for $3,000. To the holding that Moe is entitled to no part of the profits, the majority opinion cites a case from the 139 Federal. That case is wholly

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different from this case. When the defendant in that case effected a sale, he, appearing as one of the purchasers, had no option, but was secretly acting as an agent of the vendor. He in fact contributed nothing to the venture. He acquired an option afterward to conceal the fraud.

In the Wisconsin case cited, the defendant Hardy, while pretending to cooperate with the plaintiff in the purchase of the property, was, as the court found, in fact the agent of the vendor. He had no option on the property, and concealed from the plaintiff his real relationship to the transaction. The effect of the transaction was to give the defendant a one-fourth interest in the property without paying anything therefor. This he got not by virtue of any option or thing of value which he put into the joint adventure, but by falsely pretending that the price of the land was $8,000 when in fact it was but $6,000. Plaintiff, having discovered the fraud after he had paid $2100 to the defendant for the one-fourth interest in the land, brought suit for damages for deceit and had judgment for $1,000.

None of the other cases cited are like this case in the features which I have hitherto pointed out, in that Moe put his option into the deal, and through his efforts secured the property for the syndicate at half what plaintiffs admit it was worth. They were willing to pay, as their actions show, $3,000 for a one-half interest in the venture. They supposed the property was costing the syndicate $6,000. Their agreement was made on that basis, and they received for their $3,000 exactly what they bargained for, namely, a one-half interest in the enterprise. Had Moe, in fact, paid the $3,000 as he pretended he was doing, the plaintiffs would have been no better off, so far as what they received is concerned, than they are now. Their injury results from, and their cause of action is founded upon, the fact that Moe obtained a secret profit to the extent of the stock issued to him above what he might equitably be entitled to as the owner of the option. Plaintiff's injury was in Moe's not giving them, as members of the syndicate, a share in this profit. The case being one in

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equity, the accounting as to these profits should cover the whole question as to what the profits are, including a consideration of the value of the option, and divide them among the members of the syndicate.

No. 9652.

THE WESTERN LIGHT & POWER CO. v. POOR.

Decided December 6, 1920. Rehearing denied Jan. 10, 1921.

Action for personal injuries sustained by contact with a broken electric wire. Judgment for plaintiff.

Reversed.

1. DAMAGES—*Negligence—Pleading—Instructions.* In an action for personal injuries alleged to have been occasioned by a broken electric wire, an allegation in the complaint to the effect, that defendant was negligent in permitting the wire to remain in contact with the limb of a tree thereby becoming worn, abraded and burned in two and falling on and remaining across a public highway, is sufficient to justify an instruction that the jury might find the defendant guilty of negligence irrespective of the cause of the break, if it knew, or by the exercise of the utmost care, should have known that the wire was down.

2. APPEAL—*Judgment Supported by Evidence.* In a negligence case where there is competent testimony to support the judgment, it will not be disturbed on the ground of insufficient evidence.

3. DAMAGES—*Exemplary—Instructions.* It is error to charge a jury on the question of exemplary damages when there is absolutely no evidence in the record upon which to base such an instruction.

Error to the District Court of Larimer County, Hon. Neil F. Graham, Judge.

Mr. PAUL W. LEE, Mr. GEORGE H. SHAW, for plaintiff in error.

Mr. G. W. MUSSER, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

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DEFENDANT in Error brought this action against Plaintiff in Error for alleged damages sustained by contact with a broken electric wire. From a judgment in his favor for $2500 the Company brings the cause here for review. The parties are hereinafter designated as in the trial court.

Defendant owned and controlled an electric line, carrying 6600 volts, suspended on poles some 25 feet from the ground, and passing near a schoolhouse. Plaintiff, a boy of about ten years of age, attending this school, was sent by his teacher on the morning of September 3, 1918, on an errand to a nearby farmhouse. While so employed he came in contact with the wire in question and received the injury complained of. This action was originally brought for $2050 actual damages and $1000 punitive damages. Thereafter the complaint was amended fixing the actual damages in the sum of $10,050. The negligence charged against defendant was the construction and maintenance of the line in question in the place and manner before mentioned, and "in suffering and permitting the wire in question to remain in contact with and rest against a limb of one of the trees hereinbefore mentioned and thereby become worn, abraded, and burned in two, and fall and remain upon and across the public highway."

Defendant denied the negligence and denied that the breaking of the wire occurred in the manner alleged.

Burke, J., after stating the facts as above.

Defendant insists that the evidence is insufficient to support the verdict, and that the court erroneously instructed the jury that it might find the defendant guilty of negligence, irrespective of the cause of the break, if the company "knew that the said wire was down, or by the exercise of the utmost care should have known that the wire was down." The allegation in the complaint was sufficient to justify that instruction.

On the question of the breaking of the wire, the negligence of the defendant, and the actual damages, the proof is sufficient. *Denver Con. Electric Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Haynes v. Gas Co.*, 114

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N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786. The judgment will not be disturbed on the ground of insufficient evidence. *Hallack et al. v. Stockdale et al.*, 14 Colo. 198, 200, 23 Pac. 340.

The court instructed the jury that it might return a verdict for exemplary damages in any sum not exceeding $1000 if it found the injury complained of was "attended by circumstances of wanton and reckless disregard of plaintiff's rights and feelings, on the part of defendant company." There is absolutely no evidence in the record upon which this instruction could be based. *Page v. Yool*, 28 Colo. 464, 467, 65 Pac. 636; *Eisenhart v. Ordean*, 3 Colo. App. 162, 169, 32 Pac. 495.

What portion of the sum fixed by the jury was allowed as exemplary damages this court has no way of determining. A new trial is therefore necessary.

There are other errors in this record which it seems unnecessary to consider as they will doubtless not occur again.

The judgment is accordingly reversed and the cause remanded.

MR. JUSTICE SCOTT not participating.

No. 9680.

PROUSE v. THE INDUSTRIAL COMMISSION OF COLORADO, ET AL.

Decided Dec. 6, 1920. Rehearing denied Jan. 10, 1921.

Proceeding under the workmen's compensation act. Claim denied.

Affirmed.

1. WORKMEN'S COMPENSATION—*Industrial Commission—Findings of Fact.* It is duty of the commission to make sufficiently detailed findings of fact so that the courts can determine whether the order or award is supported by the facts.

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Statements which amount to mere conclusions are not sufficient.

2. APPEAL AND ERROR—*Review of Evidence—Industrial Commission.* The appellate court cannot review an industrial commission case on the evidence, but where the evidence is undisputed it may be treated as the findings of fact and considered accordingly.

3. WORKMEN'S COMPENSATION—*Accident.* An accident under the various workmen's compensation acts, must be traceable to a definite time, place and cause; the occurrence constituting an accident must be unexpected and must be the proximate cause of death, where death results, or of the disease which produced the death.

Error to the District Court of Boulder County, Hon. Neil F. Graham, Judge.

Messrs. RINN & ARCHIBALD, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. JOHN S. FINE, assistant, Mr. WALTER E. SCHWED, Mr. H. E. CURRAN, Messrs. HUGHES & DORSEY, Mr. W. M. BOND, JR., Mr. ROBERT L. STEARNS, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THE Industrial Commission denied the claim of the plaintiff in error, Pearl Prouse, for compensation for the death of her husband, and its judgment was affirmed by the district court.

It is claimed, first, that the commission did not make sufficient findings of fact as required by law, and second, that the commission erroneously held that the death of the husband of plaintiff in error, George Prouse, was not caused by accident.

As to the first point, the finding of the commission was "that the burden of proof is upon the claimants herein. That the claimants have not established their claim by a preponderance of the evidence. That they have not established that the death of the said George Prouse, deceased, was caused by any accident arising out of and in the course

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of his employment while employed by the said The Rocky Mountain Fuel Company, and that they have failed to show any connection between his death and any alleged accident sustained by him while in the employ of the said The Rocky Mountain Fuel Company and that therefore the claim of the said claimants should be denied."

It is the duty of the commission to make sufficiently detailed findings of fact so that the courts can determine whether the order or award is supported by the facts. S. L. 1919, p. 743, § 103 and S. L. 1915, p. 558 § 81. This seems to be the rule in other jurisdictions. *Gardner v. Horseheads Construction Co.*, 171 App. Div. 66, 156 N. Y. Supp. 899; *Inland Steel Co. v. Lambert*, 118 N. E. (Ind.) 163; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686; *Dodge v. Barstow Stove Co.*, 40 R. I. 191, 100 Atl. 245.

The findings of fact in this case are insufficient. They state merely a conclusion of law.

We have no right to review the case upon the evidence, S. L. 1915, p. 558 § 81. The evidence, however, in this case, is not conflicting, the facts are undisputed, and we think the commission's decision was right, therefore the case is not remanded for more detailed finding, but we consider the evidence as if it were the findings of fact.

George Prouse on the 15th day of December, 1917, was working with others in the Mitchell mine. They broke into an old, enclosed entry, whence came foul air and dioxide gas. Foul air and gas continued in the mine for some weeks and until Prouse was compelled to stop work.

About January 1st, 1918, his physician was called to see him, and told him that he was working too hard in bad air and advised him to lay off.

About the 12th or 15th of January the physician was called again and found him suffering from headache, pain all over, sore throat and high temperature. He later went back to work, however. Two or three days later the doctor found him much worse; he was taken to a hospital and about the 17th of February died. The bacteriologist's test showed septicemia. Dr. Braden, the physician who at-

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tended him, testified that, in his opinion, the immediate cause of death was septicemia; that a contributing cause was his failure to show the average resistance and that was "the result of working in a poorly ventilated atmosphere. That is my opinion, that was what I had in mind when I advised him to lay off." Dr. Reed, the bacteriologist who had charge of the patient at the hospital, gave his opinion that the direct cause was *pyaemia*, (of a similar nature to septicemia) and his opinion also was that the bad ventilation at the mine had rendered the patient susceptible to the infection, but there was no evidence as to when, where or how the patient contracted it.

The statute, Session Laws 1915, page 532, § 8, provides for compensation only "where the injury is proximately caused by accident. * * *."

The question is whether the death of George Prouse was proximately caused by an accident. There is no evidence that such is the case. The evidence is undisputed that the man died of infection by the germ of septicemia or pyaemia. There is no evidence as to where he got that germ. There is no evidence that the sudden inhalation of gas and foul air from the old workings caused the disease, but the evidence is that the continued inhalation of foul air in the mine rendered the patient more susceptible or less resistant to the infection, and so contributed to the death.

There are several reasons why this is not within the terms of the statute above quoted: First, an accident, under the various workmens' compensation acts, must be traceable to a definite time, place and cause. *Matthiessen &c. Co. v. Industrial Board,* 284 Ill. 378, 120 N. E. 249. The occurrence shown in the evidence is not traceable to a definite time. Second, the occurrence constituting an accident must be unexpected. 1 Corp. Jur. 39; *Matthiessen v. Industrial Board, supra.* In the present case it was not unexpected. Third, The occurrence must be the proximate cause of the death or of the disease which produced the death. This occurrence was not.

As to the first point: In the present case the time is

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indefinite. A continued working in bad air for somewhere between two weeks and two months depleted the system and rendered it susceptible to a disease or unable to resist a disease, the time, place or manner of contracting which is not shown by the evidence, nor is anything shown from which it can be determined.

The case most nearly like the present is the Scotch case, *Kelly v. Coal Company*, 48 Scottish Law Rep. 768, but there the "accident" was "one lethal dose" of carbon monoxide generated by an explosion of gunpowder. The court lays stress upon the point that there was an unusual occurrence on a definite day from which the symptoms were immediately felt, and they cite *Steele v. Cammell et al.*, (1905) 2 K. B., holding that "injury from long continued breathing of lead fumes was not accidental because it could not be traced to any particular day, but was the result of an accumulation of poisoning extending over a period of time." *Broderick v. London County Council*, 2 K. B. 807, is also cited upon the same point.

The Scotch case, then, is an authority against and not for the claimant in this case. See also, *Alloa Coal Co. v. Drylie*, 6 B. W. C. C. 398; *Hurle v. Plymouth Cordage Co.*, 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919.

Upon the second point: An accident must be unexpected. Bad air, continued from day to day, is expected. The doctor expected it to continue and advised a lay-off. Prouse knew it was bad, knew it was continuing, or he could not have told the doctor about it. Prouse continued to labor in the gas-contaminated air for some weeks, growing constantly worse, so his doctor testified, because of the bad air. This is no accident. Every definition or attempted definition of accident includes the element of unexpectedness. 1 Corp. Jur. 390; *Matthiessen v. Indus. Bd., supra; Kelly v. Coal Co., supra; Broderick v. London County Council, supra; Steele v. Cammell &c., supra.* The deleterious result was also expected; the doctor warned against it; so the deleterious result was not an accident.

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As to the third point: Prouse did not die of the poisonous gas; he died of septicemia or pyaemia, a disease caused by a definite infection by a germ which has been isolated by the bacteriologists and classified. The only connection which the gas and bad air had with this disease, according to the undisputed testimony of the physicians, was that it depleted the patient's system and rendered him more susceptible or less resistant to it. They do not say that he would not have contracted the disease if he had not worked in the gas, or would not have died of it, nor do they express such opinions.

Bad air makes a man more susceptible to tuberculosis. Every clerk works part of the time in bad air. If he contracts tuberculosis no physician can deny that the bad air probably made him susceptible and so was a contributing cause. If so, is he entitled to compensation? So of any other germ disease, e. g., typhoid fever, infant paralysis, meningitis, &c., &c.

The decision in the case of the *United Paperboard Co. v. Lewis*, 65 Ind. App. 356, 117 N. E. 276, seems to us extreme in itself, but the *dicta* of the court therein would seem to make the employer liable for every case of sickness of which the employment was the procuring cause, and we cannot follow it.

The Massachusetts cases have no bearing here because the Massachusetts Act does not use the word "accident" nor any derivative or equivalent. The word "accidentally" and the words "proximately caused by accident" in our Act, Session Laws, page 522, § 8, must be given some force.

The judgment of the district court is affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE SCOTT dissent.

MR. JUSTICE TELLER not participating.

MR. JUSTICE SCOTT dissenting.

I must earnestly dissent from the opinion of the majority. To my mind there is no reasonable distinction to be

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made between this case and that of Carroll, considered at the same time, wherein a precisely contrary view of the law is taken. Hair-splitting distinctions used in the opinion do not cover the wrong and injustice to follow, not in this case alone, but in others of a similar character.

The difficulty seems to lie in the seeming inability of lawyers and judges to get away from the hoary defenses of contributory negligence and assumed risk in negligence cases, so clearly wiped out by the express language of the statute we are considering.

A consideration of the majority opinion will disclose that the conclusion is based solely upon the doctrine of assumed risk. Prouse went back to work after the gas was discovered, which act was his own fault and by which he assumed the risk and should not recover. Such is the reasoning, and the opinion not only ignores the command of the statute in this respect, but fails to comprehend the principle and purpose of the legislative acts of the character involved.

The statute is not penal in its nature, nor compensatory as against the employer, and therefore every element of negligence has been eliminated by it from consideration. For this there has been substituted the policy of humanity and state polity, immediate provision for the injured and his dependents, and economy to the state and the public in avoiding to the extent possible the number of public charges.

The insurance is primarily by the state itself, and profit from premiums paid in such insurance by the state was never contemplated by the European founders of the plan, nor by the American states which have adopted it. The compensation allowed does not rest upon either duty or contract. Such statutes are sustained only upon the theory of the exercise of the police power.

With this view of the purposes and character of the act, the authorities hereinafter cited fully sustain the view that compensation should have been awarded in this case.

George Prouse was a coal miner in the employ of the defendant, The Rocky Mountain Coal Company, and at the Mitchell Mine. While so employed, and on or about the

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15th day of December, 1917, there was broken into an old and enclosed entry, from which there exuded foul air and gas, termed dioxide gas, which condition continued until he was compelled to and did cease to labor, dying shortly after from the disease called pyaemia, being a poison; a germ disease. His death occurred on the 17th of February.

He had theretofore been a strong healthy man, weighing about one hundred and eighty pounds, working constantly, and had not theretofore suffered from any illness.

His family physician, Dr. Braden, who had known him for some years, was called to see him the latter part of December or the first of January. He complained of a cough and weakness, and that he had difficulty in doing his work, and had lost much flesh. The doctor concluded that he was working too hard and probably in bad air, and advised him to lay off.

The physician was called to his home at a time from the 12th to the 15th day of January, and found him suffering from a headache, aching all over, with a sore throat and high temperature. The deceased went back to work later. But about the third day after the call above stated, the physcian found him in the condition as follows:

"I saw him about the third day, when he began to have fever and pains in the right upper chest and shoulder. He had not been able to bathe himself and still had the coal dust on him from the mines. He said he had a bad night, slept very little, vomited, had headache and ached all over; his temperature was about 104.

Q. What did he do after that? A. His condition was similar the next day. He vomited and took very little nourishment; breathed rapidly, abdomén extended and had pains in the shoulder. I am not positive as to the time of these things. One ankle became swollen, his knee became swollen and there was evidence of a fluid of some kind in his knee. Later one wrist began to swell and after a few days the other wrist became involved. This covered a period of probably two weeks. Then one eye became inflamed and swollen until it could be brushed from the

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socket; he became blind in one eye. During the time these changes were taking place he developed symptoms of endocarditis, or inflammation of the linings of the heart. He had a septic type until we sent him to the hospital along about the 14th or 15th of February."

Dr. Braden's testimony as to the cause of death was as follows:

"I think that the immediate cause of death was septicemia, that was my diagnosis before sending him here, and my report from Dr. Reed was that the bacteriological test showed septicemia from the blood and from the pus taken from the infection in the left shoulder. The contributing cause was his failure to show the average resistance, and in my opinion, his failure to show the average resistance, was the result of working in a poorly ventilated atmosphere; that is my opinion. That was what I had in mind when I advised him to take a lay-off."

The only other physician to testify was Dr. Reed, who had charge of the patient at the University Hospital. He treated him from the time of his entrance to the hospital until his death. He gave it as his opinion that the direct cause of his death was pyaemia. It seems that pyaemia, like septicemia, is a germ poison and of similar nature. Dr. Reed was asked the questions and gave answers as follows:

Q. Assuming the above statement of facts as disclosed in Question No. 1 to be true, could you not state with reasonable certainty, and from the examination you made of the deceased, that the pyaemia followed as a natural consequence from the injury to the system and to the throat and lungs of the said deceased, which was originally caused by the inhalation of poisonous gases as aforesaid?

A. My answer to that question is simply this, as Dr. Braden has stated two or three times, and I want to confirm because it is my own belief, that his working in bad air and lowering his general state of health put him in such a position, that his resistance is bad; now an infection comes along at a time when his vitality is low and he is

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susceptible to it, and succumbs to it and dies of pyaemia.

Q. This morning, Doctor, did you not answer this question which I have just written and read to you in this way, "there would seem to be a reasonable connection between his pyaemia and infection and the gas inhalation"?

A. Yes, I will still say the same thing.

Q. Is it not a fact that germs or microbes may affect the human system by being breathed into the throat and lungs?

A. Yes.

Q. Is it not a fact that a weakened condition of the body caused by a continuous inhalation of mine gas will render such body reasonably susceptible of becoming poisoned by the microbe which is the basis of pyaemia?

A. Yes."

Dr. Braden also testified that there was a reasonable connection between the inhalation of the gas which the patient inhaled and the disease from which he died.

There was no contradictory testimony given or offered. There is much other testimony by these physicians that makes the conclusion irresistible that the disease from which Prouse died was induced and caused from inhaling the gas from the mines in which he was working.

We now come to the question as to whether or not under the facts and circumstances of this case, appearing from the record, the petitioners are entitled to recover under the Workmen's Compensation Law. Was the death of Prouse the result of an accident within the meaning of the law?

It is generally held that the term "accident," within the meaning of the statute, cannot be confined to an injury by external, violent and accidental means, but includes injuries to workmen which are unexpected and unintentional. The authorities upon this question are quite fully reviewed in the case of *Fidelity and Casualty Company v. Commission*, 177 Cal. 614, 171 Pac. 429, L. R. A. 1918F, 856.

That case involved the claim to compensation under the compensation act, of a sign writer who had for about one and one-half years been in the habit of using dyes dissolved

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in wood alcohol and forced through a fine needle by air pressure. This was done in order to better shade the colors. Ordinarily this method was employed but a small portion of the time, but during the holidays, and shortly prior to the accident, it was frequently used. Without notice of anything unusual, he suddenly discovered his eyesight failing, and later was so badly affected that it prevented his following his employment. The court held that it was an accident which arose out of his employment. After a review of the authorities, the court said:

"Applying this current of authority to the facts of the case at bar, it must be evident that the injury suffered by the applicant as set forth in the findings of fact of the Industrial Accident Commission and for which he was awarded compensation was an 'accident' within the meaning of the act. Many cases might be cited from other states having similar statutes and from England, in which like unforeseen, unexpected and unintended injuries to employes have been classed as 'accidents' and held sufficient to justify awards, such as injuries sustained by persons while lifting heavy objects, or through exposure to drafts or chilly air, or icy water in mines; or through the rupture of blood vessels brought on by unusual heat or overexertion, or through the inhalation of poisonous gases, and the like; but we think the reasoning of the decisions of this court above cited sufficient to define the scope and meaning of the act so as to justify its application to the instant case."

A case very similar to the case at bar was that of *Matthiessen Co. v. Industrial Board,* by the Supreme Court of Illinois, 284 Ill. 378, 120 N. E. 249. The opinion is instructive and exhaustive, and seems to be conclusive of this point.

There, one Adrian, for many years engaged as a fireman in a smelter, where zinc ores were smelted, was required each day for a time to draw the scum and dross or oxide, from the surface of the molten zinc. He had worked up to and including the day he was stricken without indication of illness. On the evening of that day, he was seized

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with cramps through his arms, legs, chest, stomach and bowels. His teeth became black and loose, his toe and finger nails became black and his eyes glassy, and his mind wandering. He died within a short time. Two physicians testified that, in their opinion, death was caused by arsenical poisoning; that his system had become surcharged with this, and which, finally becoming acute, caused his death. The award was sustained by the court. The opinion proceeds to consider the policy and principle of the Workmen's Compensation Act along the lines of *Industrial Commission v. Aetna Life Insurance Co.*, 64 Colo. 480, 174 Pac. 589, 3 A. L. R. 1336, and declares:

"While it is not intended, and perhaps not possible to give a definition of the words used in the act as applied to all possible circumstances, it may safely be said that an injury is accidental, within the meaning of the act, which occurs in the course of the employment, unexpectedly and without the affirmative act or design of the employe. In this case there was evidence from which the industrial board was warranted in finding that on October 6, 1914, in the course of the employment of Adrian, he contracted arsenical poisoning which resulted in his death. It is true that Adrian had been exposed to practically the same conditions for many years without injury, but it would not be unreasonable to conclude that his immunity was the cause of the state of his health and his ability to resist the deleterious effect of the gases and fumes over which he worked, but this time, his physical condition was such as to make him susceptible to arsenical poisoning in such a degree as to bring on his fatal illness and death. There was sufficient competent evidence before the board to sustain the finding and it cannot be disturbed."

The doctrine announced in these cases is approved in an exhaustive review of the authorities, in *Indian Creek Coal Mining Co. v. Calvert*, 119 N. E. (Ind.) 519.

In the Scotch case of *Kelly v. Auchenlea Coal Company Ltd.*, Scottish Law Reporter, Vol. 48, page 768, will be

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found a very convincing review of the subject we are discussing. The facts of the case were:

"A miner employed in a mine in the course of his work fired a shot of gunpowder, and about three minutes after the explosion returned to the working place when it was still full of smoke. He subsequently died of pneumonia, caused by the inhalation of carbon monoxide gas generated by the explosion. It was found proved that this gas was generated by the combustion of gunpowder in varying proportions depending on the ventilation, that similar blasting operations were of daily occurrence, and that on previous occasions the deceased had suffered by headache and nausea caused by the gas. In a claim at the instance of the deceased's dependents, *held*, that death resulted from an accident within the meaning of the Act."

It is contended that the evidence does not show such causal connections between the conditions under which the work was required to be performed and the resulting injury and death.

The case of the *United Paper Board Co. v. Lewis*, 65 Ind. App. 336, 117 N. E. 276, is enlightening upon this subject. In that case, the workman, by reason of a broken pipe, was compelled to flush out the hot steam pulp into a sewer. This caused him to become overheated, and while overheated he came into contact with the open air, which caused him to chill for several days, and, as a final result of such overheating, the disease of acute nephritis, or inflammation of the kidneys developed, causing the disability claimed. The court said:

"It may be well to observe that the courts are practically unanimous in holding that the words 'by accident arising out of and in the course of the employment,' as used in Workmen's Compensation Acts, should be given a broad and liberal construction in order that the humane purpose of their enactment may be realized. Holland-St. Louis Sugar Co. v. Shraluka, 116 N. E. 330, and the authorities there cited. Their meaning, when so used, has been frequently considered in various jurisdictions having such

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acts, and it is generally accepted that an injury is received in the course of the employment when it comes while the workman is performing the duty for which he is employed, and that it arises out of the employment, when there is apparent to the rational mind upon a consideration of all the circumstances, a causal connection between the conditions under which the work was required to be performed and the resulting injury. * * *

We have held that the evidence was sufficient to warrant the board in finding that appellee was suffering from an injury by accident, and from a consideration of the rule above stated and the authorities cited, it is quite apparent that there was evidence to warrant the further finding that such injury arose out of and in the course of his employment. There was evidence which tended to show that the accident which caused the injury was the overheating described, and that it occurred while appellee was performing the duty required of him in the basement room, in flushing the hot, steaming pulp into the sewer. Under such circumstances, it is clear that the injury was received in the course of his employment. There was also evidence which tended to show that the enforced exposure in the basement room under the unusual conditions first caused appellee to become overheated, that while thus overheated he came into contact with the open air, which caused him to chill for several days, and that as a final result of such overheating the disease of acute nephritis developed, causing the disability for which he claims compensation. Such evidence furnished a sufficient basis for finding a causal connection between the conditions under which the work was required to be performed and the resulting injury. In such event, the board was warranted in finding that appellee's injury arose out of his employment."

Clearly there was established a plainer case of causal connection between the working conditions and the final result in the case at bar than in that case.

In the case of *In Re Madden,* 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000, it was held that when the already

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impaired heart of a servant was injured by her work of pulling a carpet, which did not require such a muscular exertion as would have affected a healthy person, the injury nevertheless resulted from her work as a contributing, proximate cause. The court said:

"It has been argued with force on behalf of the insurer that since the harm to the employe was not wholly the effect of the work but came in large part from the previously weakened condition of the employe's heart, hence, either there can be no award of compensation, or it should be restricted to that part of the injury which resulted directly from the work, and the part of the injury which flowed from the previous condition should be excluded. Even though the premise may be sound, the conclusion does not follow. The act makes no provision for any such analysis or apportionment. It protects the 'employe.' That word is defined in part 5, sec. 2, as including 'every person in the service of another under any contract of hire' with the exceptions not here pertinent. There is nothing said about the protection being confined to the healthy employe. The previous condition of health is of no consequence in determining the matter of relief to be afforded. It has no more to do with it than his lack of ordinary care or the employer's freedom from simple negligence. It is a most material circumstance to be considered and weighed in ascertaining whether the injury resulted from the work or from disease. It is the injury arising out of the employment and not out of disease of the employe for which compensation is to be made. Yet it is the hazard of the employment acting upon the particular employe in his condition of health and not what that hazard would be if acting upon a healthy employe or upon the average employe. The act makes no distinction between wise or foolish, skilled or inexperienced, healthy or diseased employes. All who are rightly describable as employes come within the act."

In the case of *Retmier v. Cruse*, 119 N. E. (Ind.) 32, where an employe received a severe injury to his back on September 8, 1915, and died from tuberculosis on July 8,

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1917, and where medical testimony disclosed that his injury resulted in nephritis which lowered his power to resist an attack of tuberculosis, it was held that the finding of the Industrial Commission that the injury accelerated the disease and caused his death earlier than it would have otherwise occurred, was proper and compensation was awarded.

In *City of Milwaukee v. Industrial Commission,* 160 Wis. 238, 151 N. W. 247, a school principal, while supervising a basket-ball game, within the line of his duty, was struck on the head by a ball; he was suffering at the time from an advanced stage of arterio-sclerosis. The court found that had he not been so suffering, the blow would in all probability have caused no injury. It was held:

"Proximate cause as applied to negligence law has, by definition, included within it the element of reasonable anticipation. But the right to recover under the Workmen's Compensation Act is not dependent upon a question of negligence, and an injury is 'proximately caused by accident' within the meaning of Section 2394-4, Stats. 1911, if it can be traced to physical causation not too remote in time or place to the accident, irrespective of any element of reasonable anticipation."

In *Hurle's Case,* 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919, a workman, employed in tending furnaces that produced gas from the burning of coal, was obliged to remove the covers from the holes in the tops of the furnaces about seventy times a day. At such times of removal of the covers, poisonous coal tar gases arose from the furnaces, and the workman contracted neuritis as a result of such inhalation, which caused blindness. In his claim for compensation, it appeared that there was no explosion or distinguishing difference of time or place, but simply the continuous operation of the furnaces that brought about the result. It was held that he was entitled to recover under the Workman's Compensation Act.

In the case of *Vennen v. New Dells Lumber Co.,* 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273, Ann. Cas. 1918B,

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293, where a laborer contracted typhoid fever by drinking infected water from a well on the premises of the employer and died from such fever, it was held that his dependents may recover. The court said:

"The fact that the deceased became afflicted with typhoid fever while in defendant's service would not in the sense of the statute, constitute a charge that he sustained an accidental injury, but the allegations go further, and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant, as an incident to his employment. These facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap incident to his employment. These allegations fulfill the requirements of the statute that the drinking of the polluted water by the deceased was an accidental occurrence while he was 'performing services growing out of and incidental to his employment.' It is alleged that the consequences of this alleged accident resulted in afflicting Vennen with typhoid disease, which caused his death. Diseases caused by accident to employes while 'performing services growing out of and incidental to his employment' are injuries within the contemplation of the Workmen's Compensation Act."

In the case of *London Guarantee Co. v. McPhee*, 222 Mass. 1, 109 N. E. 633, L. R. A. 1916D, 1000, the employe, while attempting to extinguish a fire on the employer's property, was drenched with water and saturated with smoke which began an invasion of his system, ultimately causing lobar pneumonia and death, in an unbroken chain of causation with the accident. Compensation was allowed.

In Vol. 89, page 380, of the Central Law Journal, under date of November 21, 1919, will be found the case of *Eldridge v. Endicott & Co. et al.*, 177 N. Y. Supp. 863, where a servant's neck was cut while being shaved in a barber shop and where the next day symptoms of anthrax arose, from which disease the servant afterward died. This was held to be due to an accidental injury arising in the course of

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employment. Many decided cases are cited in the opinion and in the extended note thereto by the publication, which sustain the conclusion herein reached.

It is suggested that there must be some definite time and occurrence to which the resulting injury must be traced. There is no clearer case reported, where the facts fix the time and the occurrence of the accident with causal resulting injury or death than the case at bar.

In the working of the mine on a date fixed, an enclosure with foul air and gas was broken into. The condition of foul air and gas continued until the laborer was compelled to quit work. Within two weeks from the occurrence, according to the testimony, he had lost flesh, and become so debilitated as to cause him to consult a physician. He again attempted to continue work but was unable to do so, and took to his bed where his condition was found to grow worse continually until his death, all occurring within a period of two months.

Two physicians testified that in their opinion there was a reasonable causal connection between the gas and foul air and the disease from which he died. This makes a clear case for compensation within the rule of the many cases I have cited.

In this case I do not hold that where a disease exists and there appears no reasonably specific cause, in the course of the employment, which hastens incapacity or produces a causal relation to death, or where no reasonably specific cause in the course of employment produces a condition which in itself is not found to have a causal relation to the injury or to the direct cause of death, that recovery may be had under the Workman's Compensation Act. The state of facts here does not present such a case, and therefore it is not necessary nor proper to consider or determine the question.

It is as certain as human testimony can make it, positive and medical expert, that Prouse died of a disease directly or indirectly due to the inhalation of gas and foul air while working in the mine of defendant company.

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It is held by the great weight of judicial authority that this constitutes an accident within the meaning of Workman's Compensation laws, and entitles the workman or his dependents to an award of compensation, simple justice and sound reason support this view.

No. 9795.

BROWN, ET AL. v. JOHANSON, ET AL.

Decided Dec. 6, 1920. Rehearing denied Jan. 10, 1921.

Action to enforce trust growing out of the execution of reciprocal wills by husband and wife, the wife having revoked her will after the death of the husband.

Judgment for plaintiffs.

Affirmed.

On Application for Supersedeas.

1. CONTRACTS—*Part Performance—Statute of Frauds.* The part performance, which will bring a contract within the provisions of sec. 2664 R. S. 1908 concerning the power of courts of equity to enforce specific performance, must consist of an act or of acts which it clearly appears the performing party would not have done in the absence of the agreement or without a direct view to its performance.

2. WILLS—*Reciprocal Wills—Contract.* Where there is an agreement between two parties to execute reciprocal wills, the contract is based on the two wills considered together and so construed. Thus construed they constitute a written contract based upon mutual definite and expressed considerations.

3. *Reciprocal Wills—Enforcement of Provisions.* Where mutual or reciprocal wills have been made pursuant to an agreement which has been executed by one of the testators dying without having made any different testamentary disposition of his property, and the other has accepted the benefits accruing to him under the will of the deceased, the agreement becomes obligatory upon the survivor and may be enforced in equity against his estate.

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Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. CHARLES W. WATERMAN, Mr. WILLIAM A. JACKSON, Messrs. CRANSTON, PITKIN & MOORE, Mr. GEORGE C. OTTO, for plaintiffs in error.

Mr. WILLIAM V. HODGES, Mr. L. R. MEANS, Mr. JAMES GRAFTON ROGERS, Mr. GEORGE L. HODGES, for defendants in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

MR. and Mrs. J. S. Brown were married in 1883. Mr. Brown died January 15, 1913, and Mrs. Brown February 12, 1916. Plaintiffs in Error, hereinafter referred to as defendants, are their children. Defendants in Error, hereinafter referred to as plaintiffs, are the children of Mr. Brown by a former marriage.

November 5, 1910, Brown and his wife executed separate wills. These wills were drawn by the same lawyer (former U. S. Senator, Henry M. Teller, now deceased), written by the same stenographer (C. J. Northrup, who testified herein), and witnessed by the same persons (George H. and John W. Hawkins, both of whom testified herein). There is no evidence that either of these wills contained any reference to the other, or to any oral agreement between the testators. Brown's will gave one-half his estate, and a life interest in the family residence and furniture, to his wife; the other half to all his children, share and share alike. After his death this will was probated and distribution made according to its terms. On the death of Mrs. Brown her will could not be found, hence, by presumption of law, it was revoked in her lifetime and she died intestate. Her estate is in course of administration in the County Court. More than five-ninths of it remains in the hands of the administrators.

Plaintiffs contend: That these two wills were made in pursuance of an agreement between husband and wife for

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the amicable and equitable distribution of their property among all the children. That in so far as the attainment of that object was concerned Mrs. Brown's will was like that of her husband. Hence upon the death of both parents all their property would be equally divided among all the children. That the revocation of Mrs. Brown's will was a violation of the contract between herself and her husband whereby her children profit to the detriment of plaintiffs. Plaintiffs therefore bring this action to enforce specific performance of the alleged contract and impress an express trust upon the property owned by Mrs. Brown at the time of her death. The trial court so found and so ordered. To review that judgment defendants bring error and the cause is now before us on their application for supersedeas.

BURKE, J., after stating the facts as above.

No good purpose can be served by a detailed review of the evidence herein. Suffice it to say that, in our judgment, it warrants the finding of the trial court of the existence of the alleged oral agreement. Assuming now that such was the contract, the validity of which we are called upon to determine, was there such part performance thereof as to bring it within the terms of Sec. 2664, R. S. 1908, and take it out of the prohibition of Sec. 2662, R. S. 1908, against the sale of real estate except by written contract expressing the consideration?

"The part performance which will withdraw such a contract from the ban of the statute must consist of an act or of acts which it clearly appears that the performing party would not have done in the absence of the agreement or without a direct view to its performance."

Horton v. Stegmyer, 175 Fed. 756, 760, 99 C. C. A. 332, 336 (20 Ann. Cas. 1134).

There is nothing in this record to indicate that J. S. Brown wished, or had any reason to wish, to discriminate between his children by his first and second marriage. To presume that he executed, and left in existence for more than two years, and until his death, a will, which, if the agreement between himself and his wife were violated,

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must result in a gross discrimination, is to presume the performance of an act on his part which it clearly appears he would not have performed without a direct view to the performance of the contract on the part of Mrs. Brown. There is ample oral evidence to support this conclusion.

It is contended on behalf of defendants that the pleadings, interpreted in the light of the legal presumption attaching, set up a written contract between Mr. and Mrs. Brown. The fact is that the contract now under consideration is not the alleged oral agreement, which must always precede the writing and into which the law presumes it to have been merged. The contract is composed of the two wills considered together and so construed. Thus construed they do constitute a written contract based upon ample, definite and expressed considerations. A careful review of the whole evidence supports, confirms, and makes inevitable, this conclusion. By this written contract, (one-half of which, i. e., the will of J. S. Brown, was produced in evidence, and the execution of the other, i. e. the will of Mrs. Brown, its contents and its loss or destruction was proved by parole beyond question), the express trust found by the trial court was created.

Neither of the wills used the words "contract" or "consideration." Neither had any direct reference to the other, or to any previous agreement for their execution. Under such circumstances defendants contend that they cannot be construed together and interpreted into a contract and the execution of one be held the consideration for the execution of the other. With this contention we are unable to agree.

"Where mutual or reciprocal wills have been made pursuant to an agreement which has been executed by one of the testators dying without having made any different testamentary disposition of his property and the other has accepted the benefits accruing to him under the will of the deceased, the agreement becomes obligatory upon the survivor and may be enforced in equity against his estate." Alexander on Wills, Vol. I., Sec. 88. *Brown v. Webster, et al.*, 90 Neb. 591, 134 N. W. 185, 37 L. R. A. (N. S.) 1196.

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It has been held that the mere fact of the execution of wills of the character and under the circumstances now before us, proves conclusively their contractual character. *Stevens v. Myers*, 91 Ore. 114, 177 Pac. 37, 2 A. L. R. 1155. New York holds not that this is conclusive proof, but that these were facts for the consideration of the trial court whose findings would not be disturbed. *Edson v. Parsons et al.*, 155 N. Y. 555, 50 N. E. 265. In Michigan it is held that two such wills, with oral evidence connecting them, as in the instant case, were contractual. "That the making of one was an inducement to the making of the other" and that the husband having died leaving his will in force equity would not permit the wife to violate that contract, but would "decree the performance of the agreement * * * or take such steps as should be necessary to prevent her from violating her part of the contract." *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. 173, 176, 1 L. R. A. 596, 16 Am. St. Rep. 528.

That there exists ample authority for the finding of the trial court that the wills here under consideration were mutual and reciprocal, that they should be construed together, that so construed they constituted a contract between husband and wife, that the execution of one was the consideration for the execution of the other, and that after the death of the husband, the probate of his will and the distribution of his estate thereunder, the wife could not violate that contract by a revocation of her will seems to us beyond question. We are equally satisfied that such a construction and interpretation is compatible with justice and equity, and that the findings are supported by the evidence and are correct.

Several other minor questions are suggested by this record and argued in the briefs, none of which we deem it necessary here to discuss. Finding no reversible error the supersedeas is denied and the judgment is affirmed.

MR. JUSTICE TELLER not participating.

MR. JUSTICE ALLEN dissents.

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No. 9924.

SCHMELZER *v.* CONDIT ET AL.

Decided December 6, 1920. Rehearing denied February 7, 1921.

Action to enjoin the foreclosure of a mortgage on mining property. Judgment for defendants.

Affirmed.

On Application for Supersedeas.

1. CONTRACTS—*Parol Evidence.* Parol evidence of the circumstances surrounding the making of a written contract may be considered when the intent of the parties making the contract is not clear from its terms.

2. *Construction.* Written proposition for the sale of mining property, acceptance, commission contract and receipt, examined and held to constitute an option only.

Error to the District Court of San Juan County, Hon. W. N. Searcy, Judge.

Mr. FRANK L. ROSS, for plaintiff in error.

Messrs. RUSSELL & REESE, for defendants in error.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error brought suit against defendants in error to enjoin them from foreclosing a mortgage upon her interest in certain mining claims.

On the trial of the cause the court found for the defendants, and entered judgment accordingly. Plaintiff in error now asks that the judgment be superseded and that a temporary injunction, which was vacated by said judgment, be continued in force pending the determination of the cause in this court.

The suit grew out of a transaction between plaintiff in error and defendant in error, Condit, in which she submitted to Condit the following proposition under date of August 30, 1911.

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"Mr. E. C. Condit,
Silverton, Colo.,
Dear Sir:

I am the owner of an undivided one-half interest in the following lode mining claims, located in the Eureka Mining District, San Juan County, Colorado, to-wit:

The Copper King,	Survey No.
The Glengarry	Survey No.
The Dupont	Survey No.
The Kingston	Survey No.
The Buena Vista	Survey No.
The Little Sliver	Survey No.

The above are patented and free from all incumbrances or counter claims, except a mortgage for $1000.00 held by Frank L. Ross, which I agree to pay off and cancel from the payments herein provided for.

I will sell you my interest as above described for the sum of Forty Thousand Dollars, payable as follows:

Cash in hand	$250.00
October 15th, 1911	250.00
January 15th, 1912	750.00
April 1st, 1912	1,250.00
August 15th, 1912	2,500.00

and $2,500 each six months thereafter until you have paid me the sum of Twenty Thousand ($20,000) Dollars, and the balance due of Twenty Thousand ($20,000) Dollars, I hereby agree to accept in the capital stock of the company you propose to incorporate for the development of this and other properties, at 50% of its par value.

I wish it understood that on all payments, not paid promptly when due, that you shall pay me interest at the rate of 6% per annum, and I hereby agree to discount all payments made before they are due at the same rate.

I expect you to pay the amount due as taxes each year, and agree that you shall have full control of my interest in the said mines so long as this agreement remains in full force and effect, and I farther agree that I will, when the second payment is made, make and execute a full and sufficient warrantee deed for my undivided one-half interest in

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the said mines, and place the same in escrow in such bank in Silverton, as you may desire, said deed to be delivered to you upon the completion of the payments named herein.

I also agree that I will give you credit for one-half the cost of obtaining an abstract of title to the said mines, to show that I have a good title thereto.

This proposition carries with it my interest in the buildings, steel tools, cars, rails, ore on the dump and in the stopes, and all other material now on the ground, or in the workings of the said mines, together with my hearty good will and best wishes for your success.

I make you this proposition for, and in consideration of the sum of One ($1.00) Dollar, the receipt of which I hereby acknowledge,

Respectfully Submitted,

Agnes A. Schmelzer."

Immediately below the plaintiff's signature to said proposition appeared the following:

"I hereby accept this proposition and agree to the conditions named therein this 30th day of August, 1911."

On the same date she gave to the defendant in error, Condit, the following writing:

"If you will undertake the sale of my one-half interest in the Copper King Group of Mines, as per contract entered into this day, I will pay you as a reward for your services, a commission of 20 per cent, on all payments made on the sale of said mines under the said contract, except on the first two payments, but the sum due thereon to be taken out of the third payment, and of the stock to be issued to me I will give you 100 per cent, and I hereby agree that when the said stock is issued, to me, I will assign to you the above proportion of the said stock.

Signed at Silverton, Colorado, this 30th day of August, 1911.

Agnes A. Schmelzer."

Plaintiff in error also gave to defendant in error, Condit, the following receipt, bearing the same date as the instrument above mentioned.

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"Received of E. C. Condit $250.00 as the first payment on bond and lease for the Copper King Group of mines located in the Eureka Mining District, San Juan County, Colorado." This receipt was in the handwriting of plaintiff in error.

The trial court held that the proposition by plaintiff to Condit and the commission agreement on the same date should be read as one instrument, and that, reading them in connection with the plaintiff's receipt for the $250.00, they should be held to constitute an option, and not a contract of sale. The court reached its conclusion, however, after having heard evidence from the parties as to the circumstances under which the contract was made.

Plaintiff in error urges that the admission of such evidence was error, inasmuch as she contends there is no ambiguity in the contract. We think, however, that the case falls within the well established rule that the circumstances surrounding the making of the contract may be considered when the intent of the parties in the making of the contract is not clear from its terms. The acceptance of the original proposition, standing by itself, might properly be considered as making with the proposition, a contract of purchase and sale, but it is wholly inconsistent with the commission contract, and with the receipt written and signed by the plaintiff, in which the instrument is denominated a bond and lease. We are of the opinion that the trial court was justified in holding that the contracts formed an option only. That being so, Condit, was at liberty to enforce the mortgage against the property after having abandoned all claims under the option. It is not necessary therefore, to consider the other errors assigned.

For the reasons above stated, the supersedeas is denied and the judgment is affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE DENISON concur.

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No. 9360.

THE ANTERO & LOST PARK RESERVOIR CO. ET AL. v. LOWE ET AL.

No. 9363.

LOWE ET AL. v. THE ANTERO & LOST PARK RESERVOIR CO. ET AL.

Equitable action involving the construction of an irrigation system and contracts relating thereto.

Decree Reversed.

1. CONTRACTS—*Parol Evidence.* In the absence of evidence of mutual mistake, fraud or misrepresentation, parol testimony is inadmissable to vary the terms of unambiguous written contracts, and they are to be construed according to the intention of the parties as therein expressed.

2. WATER RIGHTS—*Reservoir Contracts—Public Policy.* A contract with a reservoir company, which is constructing a storage reservoir, for the sale of water rights therein upon a status of equality based upon its capacity to store, with a clause enjoining diligent effort to conserve all the available flow, and absolving the company from liability if less than the maximum capacity is obtainable, is not against, but in conformity with public policy.

3. CONTRACTS—*Public Policy.* Public policy requires that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and enforced by the courts.

4. *Contract for Sale of Reservoir Rights—Construction.* Under a clause in a contract for the sale of storage reservoir rights, providing that the system should on a certain date be turned over to a company to be organized by the subscribers to the rights, the property did not pass *ipso facto* to the contract holders immediately on the date mentioned, there being no company organized to take it over.

5. IRRIGATION DISTRICTS—*Contracts—Power of Board.* Where the electors of an irrigation district vote to purchase an irrigation system to be completed according to certain plans and specifi-

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cations prepared by an engineer, the district board is without power to authorize material changes in the plans and any contract entered into by the members thereof materially changing the system from that authorized by the electors, is illegal.

6. CONTRACTS—*Specific Performance.* Specific performance is not a matter of right, but of grace, and a court of equity will not be swift to enforce specific performance of a contract that has been allowed to expire by lapse of time and that has been defaulted and forfeited.

7. *Specific Performance—Mutuality.* An action for specific performance of a contract for the construction of an irrigation system cannot be maintained unless plaintiff could be compelled in a court of equity at suit of the defendant, to perform it on his part. The remedy must be mutual.

8. IRRIGATION DISTRICTS—*Action by Tax Payer.* In the absence of fraud, a taxpayer of an irrigation district has no capacity to bring an action for the district against the will, discretion and judgment of the district board in whom is vested by statute the power and authority to exercise such judgment.

Discretion exercised by the proper authorities, unless abused, cannot be reviewed by the courts at the instance of a taxpayer.

Error to the District Court of Adams County, Hon. Harry S. Class, Judge.

IN NO. 9360.

Mr. L. F. TWITCHELL, Messrs. GOUDY & GOUDY, Mr. J. H. BURKHARDT, Mr. PAUL M. CLARK, for plaintiffs in error.

Mr. CHARLES F. TEW, Messrs. BARDWELL, HECOX, MCCOMB & STRONG, Mr. PERRY D. ROSE, for defendants in error.

Messrs. MELVILLE & MELVILLE, Mr. H. L. SHATTUCK, Miss E. M. WALTON, for East Denver Municipal Irrigation District.

Mr. C. H. PIERCE, for intervenors.

Mr. F. W. SANBORN, *Amicus Curiæ.*

IN NO. 9363.

Mr. CHARLES F. TEW, Messrs. BARDWELL, HECOX, MCCOMB & STRONG, for plaintiffs in error.

Mr. L. F. TWITCHELL, Messrs. GOUDY & GOUDY, Mr. J. H. BURKHARDT, Mr. PAUL M. CLARK, for defendants in error.

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Messrs. MELVILLE & MELVILLE, Mr. H. L. SHATTUCK, Miss E. M. WALTON, for East Denver Municipal Irrigation District.

Mr. C. H. PIERCE, for intervenors.

Mr. JAMES A. MARSH, Mr. NORTON MONTGOMERY, Mr. S. W. SANBORN, *Amici Curiæ.*

En banc.

MR. CHIEF JUSTICE GARRIGUES delivered the opinion of the court.

THIS case contains probably the longest record ever brought to this court. There were 165 days spent in the trial, 80 witnesses were examined and 385 exhibits introduced in evidence. The record contains 40,000 folios of typewritten matter. The printed abstract contains 16,294 pages and there are 1,428 printed pages of brief and argument.

In 1879 the Platte Land Company, Ltd., called the English Company, for the purpose of irrigating a large body of land it owned near Denver, constructed the Highline canal at a cost of $644,000, which is about 83 miles long, and covers over 100,000 acres. It caused to be organized a holding company called The Northern Colorado Irrigation Company, which held the title to the canal and water privilege, and the Platte Land Company held and owned its stock. In the general ditch adjudication in 1884 the canal was decreed a direct appropriation from the river for 1,184 cubic feet per second for irrigation, with a priority as of January 18, 1879. The company which owned and managed the canal sold to consumers water rights for about 30,000 acres which of course were confined to the river flow, and in low stages not always obtainable to the full amount, and sometimes not any on account of ditches with senior priorities demanding and taking all the water. At the time of the trial there were outstanding and in force ditch rights for about 25,000 acres. In 1891 one Cyrus Richardson filed upon and began the construction of the Antero reservoir in Park county for the purpose of supplementing the ditch rights. Soon thereafter he conveyed his reservoir

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holdings to a corporation called the Highline Reservoir Company, of which he was president and general manager. October 3, 1907, after about $50,000 had been spent on the project, the Antero and Lost Park Reservoir Company, plaintiff in error, defendant below, purchased the site for $75,000, and after making additional and amended filings completed the reservoir at great expense, so that in 1909 the dam embankment had been constructed to a height of 46 feet, the dam was 4,150 feet long, faced with concrete, and the reservoir at its 33 ft. contour line had an estimated storage capacity of 71,000 acre feet and at its 36 ft. contour line had an estimated storage capacity of 85,600 acre feet, 300 acre feet of which had been reserved to Mrs. Richardson. While it was the intention and purpose of the company to store water in the reservoir for irrigation and domestic purposes generally, it expected to be able to sell storage capacity under a form of reservoir contract, and naturally the promoters supposed the principal market for such contracts would be with land owners under the Highline canal. (For a more detailed statement, see *Antero and Lost Park Reservoir Co. v. Ohler,* 176 Pac. 287, 65 Colo. 161.) For this reason the company desired to own and operate the Highline in connection with the reservoir. February 1, 1909 a contract of purchase was entered into whereby the reservoir company acquired the Highline, and 10,800 acres of land from the Platte Land Company, of which 8,000 acres were under and 2,800 above the line of the canal, and 3,580 acres lay within what afterwards became the exterior boundaries of the East Denver Municipal Irrigation District, defendant in error. The purchase price was $600,000 with interest on deferred payments which were to be made from a period extending from April 1, 1909 to July 1, 1913. The canal was conveyed by transferring the entire capital stock of The Northern Colorado Irrigation Company, as representing the ownership of the canal, which was placed in escrow and turned over to the reservoir company upon final payment of the purchase price, and as payments for the land were made deeds

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were executed to the reservoir company, and it took immediate possession of the canal. The contract of purchase, among other things, contained the following clauses:

"No irrigation district shall be organized by or through the efforts or influence of the second party that shall include any of the lands covered by this contract, unless such lands shall have first been paid for in full under the terms and conditions of this contract, and deeds issued therefor by the first party to the second party.

"No incumbrance shall be placed on any of the lands or water rights described in Schedule 'A' until the same shall have been deeded to the second party, nor shall anything be done by the second party while in the management, operation and control of the said Highline canal or in connection therewith which shall change the status of the present conditions, except in the matter of selling perpetual reservoir water rights to owners of water rights in the said Highline canal as hereinafter provided, nor shall the party of the second part sell or contract to sell in the name or by the authority of The Northern Colorado Irrigation Company any new or additional water rights, but each and all of said matters shall remain as they now are until all of the lands covered by this contract shall have been paid for in full to the first party under the terms and conditions thereof.

"The second party may sell perpetual water rights in its reservoirs to owners of water rights in the said Highline canal, which may be in good standing, but to no other persons, until final payment has been made on this contract, and may contract for the carriage of said water through the said Highline canal at such times as there shall be room in said canal to carry said reservoir water; that is to say, at such times as the reasonable and safe capacity of the said canal shall not be needed to carry the water to which the owners of water rights in said canal may be entitled; provided that contracts for the running of said reservoir water in said Highline canal shall include an annual charge by the said The Northern Colorado Irrigation Company at a rate of not less than Fifty (50) cents per acre, and all such

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contracts shall be subject to the approval of the first party."

After making this contract, the reservoir company sold reservoir rights to land owners under the Highline having water rights in the canal. February 19, 1909 it entered into a contract to sell the land so purchased from the English Company to Annis & Simonson, land agents and speculators, upon the same terms by which it had purchased it from the Platte Land Company to which it attached reservoir rights for 8,000 acres, amounting to 8,000 acre-feet, represented by reservoir contracts similar to those sold to holders of ditch rights. The total amount of storage capacity sold, including rights sold for the land purchased from the English Company, was about 11,000 acre-feet under a form of contract, which, among other things, provided:

"The said party of the first part hereby agrees to sell unto the said party of the second part, and the said party of the second part hereby agrees to buy, a water right for .....acres in the reservoir of said company, known as the Antero Reservoir; a.....acre water right being such proportionate part of the whole capacity of the said reservoir as.....acre feet bears to the entire available capacity in acre feet of said reservoir, being the *pro rata* share of the total contents of said reservoir; for example: 80 one hundred-acre water rights require a completed storage capacity of 8,000 acre feet, and so on, in the same proportion for each additional water right sold until said reservoir is completed to a maximum capacity, as determined by a contour one foot survey made under the supervision of the State Engineer, of approximately 85,000 acre feet, so that all 100-acre water rights sold will be of equal status and of the measure of, as an illustration, and taking 85,000 acre feet as said maximum capacity, 1/850th part of the completed and available capacity of said reservoir. The water stored in said reservoir shall be distributed *pro rata*, not only once in each year, but as many times as the reservoir can be filled, or partially filled by the use of reasonable diligence during the year.

"Fourth. It is distinctly agreed by and between the

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party of the first part and the party of the second part, that if through unavoidable accident said reservoir shall in any season be unable to receive or hold in storage a quantity of water equal to its then existing capacity to store water, or if through unforeseen and unavoidable accident, any of the structures connected with said reservoir shall be unable to carry and deliver the same at the time required, said company shall not be liable for any damages thereby accruing to the party of the second part, or assigns. The said reservoir company agrees to use reasonable diligence to fill the said reservoir from its appropriations of water now or hereafter made for that purpose, and in case said appropriations fail to fill the same in any year through drouth, shortage of water supply, or any other reason beyond the control of the company, said company shall not be liable in any way for such deficiency of water in said reservoir.

"Fifth. It is further expressly understood and agreed that the party of the first part agrees to construct and will construct and complete said reservoir and all inlet and outlet ditches and other works to a capacity necessary to safely store one acre-foot of water for each acre of water rights sold and outstanding, and it is agreed that when the entire capacity of said reservoir has been exhausted by the sale of water rights fully paid up, or sooner, at its option, and at all events on or before January 1st, 1915, the party of the first part shall turn over the entire Antero Reservoir and its appurtenances and the full management thereof to a company to be organized by said subscribers, the said reservoir, inlet and outlet ditches, and water rights, with their appropriations and appurtenances, to be then free and clear of all liens and incumbrances whatsoever, and all of said works to then be in good repair and condition, subject nevertheless, at all times, to the burden and easement therein of all the water rights sold as aforesaid, the stock of said company to be issued to the subscribers *pro rata* on the water rights held by them respectively, and the party of the first part agrees to take stock for the then unsold

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water rights of any *pro rata.* And it is further expressly understood and agreed by and between the parties hereto, that it is the intention of said first party to complete its dam to said Antero Reservoir, to a height of 46 feet after settlement thereof, at the highest point, and approximately four thousand feet in length, and that the said dam is to be ten feet higher, after settlement, then the high water line of said reservoir, leaving a margin for safety of ten feet from the top of the water to the crest of the dam, so that the ultimate capacity of said reservoir, when completed, will be as ascertained by said contour survey, taking 36 feet as the high water line, and that said second party enters into this contract on this understanding."

Paragraph 6 provides that upon final payment the title to the water right shall, subject to the terms and conditions therein contained, vest fully in the purchaser without further deed or conveyance.

In 1909 settlers beyond the terminus of the Highline sought to bring their lands (about 60,000 acres) under irrigation by extending the canal and forming an irrigation district under the extension. Their notion was to organize such a district to construct the extension and necessary laterals, purchase the Antero reservoir and Highline canal, enlarge the latter, and construct necessary plains reservoirs within the district to be used as equalizing and distributing reservoirs. To accomplish this purpose, persons interested in the proposed extension ditch and irrigation district organized a promotion company in February, 1909, called the Antero Land and Irrigation Company, defendant in error, the members of which company were instrumental in causing to be organized the East Denver Municipal Irrigation District. This district was declared duly organized November 22, 1909, and the moving spirits in the promotion company and in the irrigation district were persons having land holdings under the extension. To be in a position to effect the object undertaken, the promotion company, in May, 1909, entered into an optional contract

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with the reservoir company to purchase the Antero reservoir and Highline canal for $1,500,000 in money, payable $1,000,000 in cash on or before 18 months and $500,000 in cash on or before 30 months from that date. Its ability to pay this sum for the property depended upon its ability to construct and turn over the entire system completed to the irrigation district and to market $3,000,000 in irrigation district bonds which was the consideration the district was to pay the promotion company for the completed system.

August 30, 1910, the district entered into a contract with the promotion company by which the latter agreed in substance to acquire and construct an entire and complete irrigation system, according to certain plans and specifications attached to the contract, comprising the Antero reservoir and Highline canal; to enlarge and extend the canal, and to construct 7 distributing laterals and 3 reservoirs specifically mentioned in the contract as the Abbott, the Terminal and the Irondale, so as to cover the 60,000 acres of land included in the proposed district; and to complete certain work on the Antero reservoir. The plans and specifications for the system necessary to furnish the district with water had been prepared by an eminent irrigation engineer of Northern Colorado by the name of E. E. Baker who had been employed by the promotion company to make a complete survey of the proposed irrigating system. The entire system was to be completed and turned over to the district by the promotion company by June 1, 1913, for which it agreed to pay the latter $3,000,000 in irrigation district bonds. The Abbott reservoir was to be constructed with an estimated capacity of 9,000 acre feet and the Terminal with an estimated capacity of 4,000 acre feet. The contract, among other things, provided:

"The company (the promotion company) shall commence the completion of the irrigation system herein provided for and agreed to be conveyed, within 30 days after the confirmation of the bond-issue as aforesaid, and shall complete the Terminal reservoir to the actual storage capacity above the floor of the outlet conduit of 2,500 acre feet by Janu-

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ary 1st, 1912, and shall complete same to an actual storage capacity of 4,000 acre feet as hereinbefore set out by January 1, 1913, and shall complete the main Highline canal extension by June 1, 1911, and the repairs and enlargements of the old Highline canal by April 1, 1912, and shall complete the Antero reservoir to said storage capacity of 71,000 acre feet by March 1, 1911, this latter to include the facing of the Antero reservoir dam, and the entire system shall be completed in a thorough and workmanlike manner and turned over to the district in working order substantial and permanent in character, according to the specifications, not later than June 1, 1913."

Had this contract been performed the district would have become the owner of a completed irrigation system subject to sharing the water stored in the reservoir *pro rata* with 12,000 acre-feet rights reserved, and sharing the capacity of the canal as enlarged with the owners of approximately 29,000 acres of Highline water rights. The district, by a vote of the people, ratified and approved this contract and authorized the issuance of the bonds, and January 24, 1912, the organization of the district and the validity of the bonds were confirmed by a decree of the district court. August 29, 1912 this contract was modified by a supplemental agreement, ratified by a vote of the people, which provided that, upon the delivery to the district of proper deeds conveying certain rights of way, and also deeds conveying to the district the filings of the Irondale, Abbott and Terminal reservoirs, the district would deliver to the promotion company $250,000 of the bonds. It further provided that the promotion company, within 30 days after receipt of the bonds would commence the enlargement of the Highline, and the construction of the extension and the system of laterals, and time for the completion and conveyance of the entire irrigation system as a whole was extended to January 1, 1914. This supplemental contract provides, among other things:

"The time for the completion and conveyance of the entire irrigation system, according to the terms of the orig-

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inal contract, is hereby extended to January 1, 1914, and may be further extended as provided in the original contract between the district and the company, to which contract this contract is supplementary."

It was expected that, having this further agreement, the promotion company would comply with its contract with the district, complete the system, and take up its option with the reservoir company, but it soon became apparent that such was not the case. In October, 1912 it began conversations with one Lucas, defendant in error, first to borrow money to complete the system, and later, when it found this could not be arranged, to sell and assign to him its contract with the district. But Lucas refused to purchase the district contract from the promotion company unless he could make a more favorable contract with the reservoir company than the promotion company had for the purchase of the property, and began negotiating independently with the reservoir company for a new contract, having in the meanwhile an arrangement with the promotion company that if he secured a contract satisfactory to himself with the reservoir company, he then would negotiate with the promotion company for the purchase of its contract with the district. December 14, 1912, Lucas was successful in making and entering into an independent contract with the reservoir company whereby the latter agreed to sell to him, and he agreed to purchase, the reservoir and Highline for the sum of $1,250,000, $1,000,000 thereof to be paid in district irrigation bonds instead of cash when he completed the system and it was accepted and turned over to the district according to the promotion company's contracts with the district, and the remainder in cash, $50,000 on or before January 15, 1913, and $200,000 on or before January 15, 1915, deeds and conveyances of title to be placed in escrow and delivered to the district upon the completion of the system in accordance with the August 30, 1910 contract as supplemented August 29, 1912. The promotion company was then in default in its contract with the reservoir company, and the latter's contract with

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Lucas was made upon the basis of the sale and assignment by the promotion company of its district contracts to Lucas, the assumption of the obligations by Lucas of the district contracts with the promotion company, and the completion by Lucas of the system in accordance with the terms, obligations, plans and specifications of those contracts. Paragraph 5 of the contract provides:

"It is understood by the parties hereto that this contract contemplates a conveyance to the irrigation district of the Antero reservoir, together with its franchises, rights, privileges, water rights and appropriations, free and clear of all incumbrances or indebtedness, subject to the vested rights of the consumers of water therefrom aggregating 12,000 acres and evidenced by reservoir right contracts which contracts the irrigation district assumes and agrees to carry out and fulfill, and that the Highline canal shall be conveyed by the delivery of the entire capital stock of The Northern Colorado Irrigation Company, and the said canal is taken subject to the vested rights of the consumers of water therefrom, aggregating 30,000 acres, more or less, evidenced by water contracts and deeds, which obligations, the irrigation district likewise assumes and agrees to carry out."

Lucas' contract with the reservoir company did not call for certain work, it called for the completion and turning over to the district of a completed system under the statute, constructed according to certain plans and specifications (including the Abbott and Terminal reservoirs) for which the reservoir company agreed to take $1,000,000 in bonds in part payment.

December 30, 1912, after extended negotiations, Lucas entered into a writing with the promotion company by which he took an assignment of its August 30, 1910 contract with the district whereby he agreed to construct, complete and turn over the system in accordance with that contract, plans and specifications. The reservoir company then placed deeds and evidences of title in escrow to be delivered upon the system being completed by Lucas accord-

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ing to the terms of the August 30, 1910 contract and turned over to and accepted by the district, and the payment of the purchase price.

The promotion company, before the assignment of this contract, had completed and turned over to the Irondale reservoir, and done a little work on laterals A and B, for which it had been allowed on estimate $49,000 in bonds.

Lucas wanted different plans and specifications, and wanted to eliminate the Abbott and Terminal reservoirs, so February 3, 1913 he induced the board of directors to change the August 30, 1910 contract. February 1, 1913 he succeeded in getting the board to adopt a resolution authorizing the president and secretary to sign with him what is known as the February 3, 1913 contract. This modified and changed the August 30, 1910 contract by eliminating the Abbott and Terminal reservoirs, and substituted other plans and specifications to be made by his engineer and the engineer of the district for those made by E. E. Baker, attached to the original contract. This February 3, 1913 contract was never ratified by a vote of the people. On the contrary, when it was later submitted for ratification, it was defeated. Lucas was active in the construction of the work until in June, 1913 when it is claimed he suspended work, and from that time on either abandoned the work entirely or did no work of any substantial character upon the system. August 25, 1913, because he had quit work, the board of directors of the district notified him of their dissatisfaction because he was making no progress with the work, and that they knew of no reason why there should be an extension beyond January 1, 1914. The reason for Lucas quitting work in June, 1913 seems to have been because he was without money to complete the system.

October 16, 1913, when the work was at a standstill, and apparently abandoned, the reservoir company sent Lucas the following letter:

"* * * We are informed that you have arranged, or are attempting to arrange with the District to forego the construction of the Terminal and Abbott reservoirs pro-

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vided for in said contract of August 30, 1910, and have made, or expect to make, other material changes in the specifications of the proposed system, including the construction of a main canal of less capacity than specified in said contract, thus materially changing and diminishing the irrigation system agreed by you to be constructed and materially affecting the value of the district bonds to be taken by us.

Our people regard the construction and completion of the Terminal and Abbott reservoirs as a very important factor in the Irrigation District's system, and in fact necessary to furnish the lands in the District an adequate water supply for irrigation.

In accordance with instructions from our Board of Directors, you are hereby notified that our Company will insist upon the completion of the entire irrigation system proposed for said District as provided for and described in the contract of August 30, 1910, according to the terms and conditions of that contract and any modifications thereof made by the supplemental contract between the District and The Antero Land and Irrigation Company of date, August 29, 1912."

He paid no attention to this letter and treated it as an ouster and repudiation of his December 14, 1912 contract with the reservoir company, and as an excuse from doing further work. January 19, 1914, the reservoir company sent him the following letter:

"Since July last, you have done no work of a substantial character on the Irrigation system for The East Denver Municipal Irrigation District and have failed to complete and convey same according to contract by January 1, 1914. In addition to these facts you have eliminated two important reservoirs from the system which you agreed to build in your contract with our Company.

We notified you on October 16, 1913, that we would not accept the system until you fulfilled your contract fully and completely. Notwithstanding the notice, you have failed to reply or to communicate with us in reference thereto.

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We are now entitled, so we are advised, to cancel your contract, if we so desire, and if necessary to protect our interests we will do so. Unless we receive some satisfactory communication from you by February 9th, 1914, we shall take such steps as we may be advised."

He failed to proceed with the work, or to pay any attention to these letters, and March 18, 1914, the reservoir company sent the following letter:

"This Company advised you on or about October 16th, 1913, that you had broken your contract with said Company by eliminating from the irrigation system proposed for The East Denver Municipal Irrigation District, the Abbott and Terminal reservoirs, and by making other changes in said system without said Company's consent and approval; and further advised you on or about January 19th, 1914, that you had committed further breach of your contract with this company by failing to complete the irrigation system, which, in your contract with this company, you undertook to complete by January 1st, 1914.

You failed to reply or pay any attention to either of these notices, and we are forced to the conclusion and now take the position, that you have renounced your obligations to this Company and terminated, by your own action, your contractual relations with The Antero and Lost Park Reservoir Company. You are therefore notified not to trespass upon, or in any way interfere with, for any purpose whatever, the High Line Canal or the Antero reservoir, or any of the properties of this Company."

The August 30, 1910 contract provided for an extension of time but Lucas never asked for any extension and was never given any, and April 11, 1914 the board of directors claimed he was in default and had abandoned the work, and passed a resolution declaring the August 30, 1910 contract assigned by the promotion company to Lucas terminated and gave Lucas notice thereof.

October 2, 1915, the ratification or rejection of the February 3, 1913 contract, and the question as to whether the August 30, 1910 contract and the August 29, 1912

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amendment thereto should be declared defaulted and forfeited, was submitted to the voters of the district, and upon such vote being taken, a majority of the voters repudiated the action of the directors of February 3, 1913 and declared the district contracts of August 30, 1910 and August 29, 1912 defaulted and forfeited.

August 31, 1915, the reservoir company entered into a contract with the city and county of Denver, through the Public Utilities Commission, to sell to the city its interest in the Highline and the reservoir for $1,050,000, subject to all outstanding water rights, and at the same time the reservoir company conveyed the reservoir by warranty deed to the city, which was placed upon record.

January 15, 1916, seven or eight land owners and taxpayers in the district began this action to enforce specific performance of the contract. The reservoir company, the promotion company, the irrigation district, the city of Denver and Lucas were made defendants, and all except Lucas resisted the action. He aligned himself with plaintiffs and in fact was the principal factor in bringing and carrying on the litigation.

Intervenors owning in the aggregate about 100 reservoir water rights and less than 1% of the outstanding rights filed a petition in intervention, claiming that the reservoir rights conveyed and agreed to furnish a specific amount of water instead of storage capacity in the reservoir; that the normal amount it can furnish each year from storage does not exceed the outstanding 11,000 acre-feet rights sold; that its capacity to furnish water is limited to the amount it can actually deliver each year; that when the company sold rights equal to its ability to furnish water each year it exhausted its capacity and it would be contrary to public policy for it to sell additional reservoir rights; that under the 5th paragraph of the contract the reservoir right holders were vested with the title of the reservoir on January 1, 1915; that the outstanding rights then sold exceeded its capacity to supply water each year; that there were no remaining rights in the reservoir; that the entire reservoir

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and all its rights belonged to the outstanding reservoir right holders on January 1, 1915 and that the deed made to the city conveyed nothing because the company had nothing to sell.

The district claims Lucas failed to carry out the August 30, 1910 contract it made with the promotion company, quit work and was in default; that the February 3, 1913 contract was illegal and that it did not desire to go forward or purchase the system, and that it was under no obligation to proceed further with Lucas; that to enforce specific performance would be detrimental to the district; that it would be better off without the system, with a charge of $12.50 an acre upon the land, than it would be to take the system and add an additional charge of $37.50 per acre; that the district and its board of directors had the right to exercise the discretion and determine whether it would seek specific performance or would treat the contract as terminated by reason of the default; that plaintiffs could not exercise the power and discretion delegated to the district; that plaintiffs had no right or capacity to prosecute the action for specific performance; that the value of the system contracted for had been destroyed by the elimination of the distributing reservoirs and failure to enlarge the Highline; that the system was not sufficient or adequate for the district; that Lucas quit work and made default in the performance of the contract, and that the attempted modification destroyed its usefulness to the district.

The reservoir company claims that plaintiffs have no capacity to maintain the action; that its contract relations were with Lucas; that he was to complete and deliver to the district the system contracted for in the August 30, 1910 contract which included the construction of the distributing reservoirs, the enlargement of the Highline so it would carry 600 second feet for delivery to the head of the extension for the district in addition to the water which would be necessary for the Highline to carry under its contract rights to other users; that Lucas had refused to construct the distributing reservoirs; had refused to enlarge the

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Highline; had quit work and refused to carry out the contract of August 30, 1910; that until the system was completed in accordance with the plans and specifications of the August 30, 1910 contract it was under no obligation to accept the $1,000,000 in bonds; that the elimination of the portion of the system which Lucas refused to construct would render the bonds practically worthless; that Lucas had defaulted in his contract with the district in that he had refused to enlarge the Highline as specified, refused to do the work upon the Antero dam which he had agreed to do, and refused to construct the distributing reservoirs, and had failed to complete the system within the time specified in the district contracts, and had quit, abandoned and refused to go forward with the work; that the reservoir company had given him notice of all these matters to which he paid no attention; that as he had failed to proceed with the work for a period of about two years the reservoir company was released from any obligations under its contract with him, and, after such release, had made a sale of its interest in the property to the city and county of Denver; that no specific performance can be decreed by the court of the district contracts; that the contracts were defaulted and abandoned by Lucas; that the contracts had expired by their own limitation. As to the reservoir rights, it claims that these rights do not sell or contract to deliver any certain amount of water; that they only sell storage capacity in the reservoir; that under each reservoir right the owner thereof is entitled to such portion of water stored in the reservoir as his right bears to the entire capacity of the reservoir. As to the 5th clause, it claims that the title to the reservoir on January 1, 1915 did not vest in the reservoir right holders; that before they could take over and operate the reservoir they must of necessity from the conditions of the contract organize a proper corporation or company to take the title.

The city and county of Denver claims the same matters claimed by the reservoir company, and also that it purchased the Antero and Highline in good faith and acted

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within its powers in making such purchase; that it made the purchase for the needs and benefits of the city and its citizens after Lucas had defaulted in the August 30, 1910 contract and after the district had declared that it would not complete the purchase of the Lucas system, and that the city was entitled to hold such property under its purchase.

Upon final hearing the court refused to give Lucas or plaintiffs any equitable relief and found neither plaintiffs nor Lucas could enforce specific performance of the contracts, that the attempted February 3, 1913 contract between Lucas and the directors was invalid; but found that intervenors were entitled to maintain their intervention; that the reservoir vested in the reservoir right holders January 1, 1915, and that such reservoir right holders were entitled to have a transfer of the reservoir to a corporation to be thereafter organized under the direction of a receiver to be appointed by the court; that the reservoir water right contracts were to furnish water annually therefrom, instead of calling for capacity in the reservoir; that the ability of the reservoir to furnish water annually was limited to 15,000 acre-feet; that intervenors were entitled to have a receiver appointed not only for the reservoir but for the Highline canal and the reservoir company; that the receiver should take over and operate the reservoir and Highline canal and repair and better the reservoir dam; deliver water from both structures and collect rentals and assessments; proceed to organize a corporation on behalf of the reservoir right holders; distribute the stock of such company among such right holders, and require the reservoir company to convey the reservoir to the corporation to be organized under the receivership, and directed the receiver to take over the books, records and papers of the reservoir company and exercise such other powers as might be conferred by the court, and entered decree accordingly.

The reservoir company, the irrigation district and the city prosecute the writ of error in case 9360 to secure a reversal of the decree in favor of intervenors. Lucas and

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plaintiffs below prosecute the writ of error in case 9363 to secure a reversal of the decree denying them specific performance of the contract and refusing to grant them any equitable relief.

GARRIGUES, C. J., after stating the case as above, delivered the opinion of the court:

1. The court found that the reservoir water right contracts contained words and phrases of doubtful meaning which made them ambiguous, and considered a vast amount of extraneous evidence as to their meaning, also as to the rainfall, run-off and drainage-area, and construed them to mean sales of a definite supply or quantity of water not to exceed a maximum of 1 acre-foot per acre as distinguished from storage capacity; that intervenors were to receive under the contract 1 acre-foot per acre each year out of the reservoir, and that to hold otherwise would make the contracts against public policy. It further found that, in average years, only 15,000 acre-feet were available for storage from the normal flow, and that this was its capacity to store and furnish water; that the contract holders became *ipso facto* the owners of the reservoir January 1, 1915, without any conveyance by virtue of paragraph 5 of the contract, and ordered that the reservoir should be transferred to a mutual company limited to 15,000 shares or acre-feet rights to be organized and operated under the direction and management of a receiver, and that stock should issue to owners of the outstanding 11,000 acre-feet rights plus 4,000 more to go somewhere not stated in the decree.

2. Are the contracts ambiguous? Intervenors' reservoir water-right contracts are before us for proper interpretation unhampered by any interpretation placed thereon by the lower court, and we are called upon first to determine their meaning, force and effect. There is no evidence of mutual mistake, fraud or misrepresentation by the reservoir company regarding the amount of water to be received thereon each year. They describe in certain and unam-

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biguous terms what is conveyed thereby, no one was or could have been deceived by the language employed, and evidence was not admissible to vary or change their terms. To put the construction placed thereon by the court makes an entirely new and different instrument than that made by the parties themselves. There is no need of any coloring background to construe or understand them, and the intention of the parties as expressed in the contract is controlling.

The court failed to state any word, phrase, clause or paragraph whose meaning was not clear and unambiguous. If it had found any ambiguity, it surely would have specifically pointed it out. Ambiguity is a question of law. The different contentions of the parties are not evidence of ambiguity. We apprehend the question did not arise from any trouble in understanding the language of the contract, but from erroneously assuming that the contracts were against public policy. If there is any such public policy as announced by the court, the contracts being clear in their meaning cannot be harmonized with it by construction, and are void.

The contract provides in unmistakable terms that the reservoir is to be constructed of a sufficient capacity to safely store in depth 36 ft. of water above the base of the outlet tube, and that intervenors acquire a right to share upon a *pro rata* basis in the capacity of the reservoir in acre-feet as such capacity becomes available until the dam reaches a height of 46 feet after settlement, the dam then to be 10 feet higher after settlement than the high water line, being a contour survey of the high water line when water is stored therein to a depth of 36 feet, giving an estimated storage capacity of 85,600 acre-feet. The limit of the right per acre is an acre-foot which is the unit of measurement and basis for a fractional pro rating to the extent that a consumer's rights in acre feet bear to the estimated capacity of the reservoir in acre feet when completed to the size, extent and capacity specifically named in the contract. The rights are based upon storage capacity and not upon the average amount of water annually available, nor-

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mally, for storage in the reservoir. The court will take judicial notice that the flow of water in the mountain streams fluctuates from scarcity to abundance at times for all the reservoirs. Undoubtedly there will be dry and wet years, and in wet years, when the water is not needed, it will remain in the reservoir until it is needed, but whether wet or dry, or in years of scarcity or plenty, the right-holders are obligated under their contracts to share the water *pro rata*. The reservoir was, or is to be if it is not, constructed on this plan to an estimated capacity when completed of 85,600 acre-feet for the purpose of catching and storing all the available winter water, flood waters, abnormal flow, in short, any and all water it can get not needed at the time for direct irrigation, and the contract provides that the company shall use reasonable diligence in the filling of the reservoir. It has always been the policy of the state to encourage the construction of reservoirs of sufficient capacity to impound not only the normal flow but the entire flow during the high water stages in whatever quantity it might come, for future use in this state. No one would construct a reservoir to a capacity of 85,600 acre-feet to store only a normal average flow annually of 15,000 acre-feet.

The water right sold is a right based upon fractional storage capacity coupled with *pro rata* distribution and an ownership in the right, and is a right to use such proportional part of the water as might be stored with an agreement upon the part of the company to use reasonable diligence in filling the reservoir and upon the part of the users, to pro rate the water actually stored up to the 36 ft. contour line, whether the consumers are early or late. The contract nowhere provides that they are to receive an acre-foot of water per acre each year out of the reservoir. We, therefore, find as a matter of law that the contracts are not ambiguous and that the court should have kept within the terms thereof for the purpose of ascertaining their meaning, and that they are to be construed as other contracts according to the intention of the parties, as ex-

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pressed in the contract. *Wright v. Platte Valley Irri. Co.*, 27 Colo. 322, 61 Pac. 603; *Hackett v. Larimer & Weld Res. Co.*, 48 Colo. 178, 109 Pac. 965; *Denver v. Brown*, 56 Colo. 216, 138 Pac. 44; *Idaho Fruit Land Co. v. G. W. Beet Sugar Co.*, 18 Idaho 1, 107 Pac. 989.

3. Are the contracts against public policy? As stated in the last paragraph, these contracts are to be construed like other contracts according to the intention of the parties as expressed in the contracts. A contract with a reservoir company constructing a storage reservoir for the sale of water rights therein upon a status of equality based upon its capacity to store, with a clause enjoining diligent effort to conserve all the available flow and absolving the company from liability if less than the maximum capacity is obtained, encourages the construction of reservoirs and is not against, but is in conformity with, public policy. Intervenors' contract violates no statute, and is not against public policy, neither is it contrary to good morals. There is no public policy against selling a right to use a portion of the water stored each year in a reservoir, based on the storage capacity of the reservoir coupled with an ownership in the right, or to contract for the disposition of such storage capacity.

"Public policy requires that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and enforced by the courts."

4. Did title to the reservoir and its management pass January 1, 1915 *ipso facto* under paragraph 5 of the contract to the outstanding contract holders without a conveyance and without the organization of a mutual company to receive, manage and operate the same, and issue stock representing rights in the reservoir?

There is no agreement in the contract that the property shall pass *ipso facto* to the water contract holders immediately on January 1, 1915. The agreement is to turn it over to a mutual company to be formed by them in which the

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reservoir company will be entitled to stock representing its interest in the unsold water rights. No such a company was or has been formed, there is no evidence that a majority of the contract holders desire to form such a company. Until such company is organized and ready to issue stock, and take the title and assume the burden and responsibility of maintaining and operating the reservoir, there is no obligation to convey it or to release control in the management and operation thereof. It may be that a majority does not care at this time to form such a company and take over the property but prefer that the management and expense of maintenance and operation should remain with the reservoir company until such time as they desire to take it over. Before changing to such a mutual company all the expense of maintenance, superintendence, operation and repairs are borne by the reservoir company; after the change such expenses will have to be borne by an assessment upon the stockholders as provided by the statute, and by-laws of their company. Intervenors represent less than 100 acre-feet of the 11,000 acre-feet of reservoir rights sold or outstanding, being less than 1 % of such reservoir right holders, and a large majority of the remaining reservoir right holders gave evidence that they did not then desire to form a corporation or take over the reservoir, but preferred its maintenance and operation remain with the reservoir company until such future time as a majority of the reservoir right holders desired, through a corporation, to assume such burden. No doubt the contract holders are entitled to have the reservoir constructed to the size and of the capacity named, and if they desire to have it turned over to a mutual company as stipulated, in which all the reservoir rights outstanding and the unsold interest whether owned by the company or the city will be entitled to be evidenced by stock, and stand upon a basis of equality. When this is accomplished all the 85,600 rights, if that is the number, will be entitled to be evidenced by shares of stock, and the company, or its assigns, will be entitled to stock representing the remaining interest not held by con-

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tracts. Though this interest belonging to the reservoir company cannot be represented by stock until the stock is issued, still such interest would represent the company's ownership of unsold water rights remaining in the reservoir, and this is a property right or interest which the company can dispose of in bulk as well as by individual sales. If the city is the owner of this right, it stands in the shoes or place of the reservoir company as to such interest, and would be entitled to the stock representing these rights in the place of the reservoir company. Whether the legal title to the reservoir remains in the reservoir company or rests in the city, or is placed in a mutual company to be formed as stipulated, the rights of intervenors under their contracts can be no more than the right to use, on a *pro rata* basis, whatever water may be stored in the reservoir according to the terms of their contracts.

5. Did the court correctly rule that the February 3, 1913 contract was void?

The district agreed by vote of the people to purchase from the promotion company an entire and completed irrigation system under Sec. 11 of the irrigation district act of 1909 according to certain plans and specifications prepared by E. E. Baker, attached to and made a part of its contract with the promotion company. This was the only system ever authorized to be purchased by a vote of the electors. It was in consideration of Lucas completing and delivering this system, and its acceptance by the district, that the reservoir company agreed to take $250,000 in money and $1,000,000 in bonds as the purchase price. Although he agreed with the reservoir company to do so in his contract of December 14, 1912, Lucas did not want to construct the system according to the plans and specifications attached to the August 30, 1910 contract and wanted to eliminate the Abbott and Terminal reservoirs, so, proceeding without authority, he induced the directors of the district to enter into the February 3, 1913 contract, in which the system adopted by a vote of the people was changed by the directors in many important particulars. Under the system voted

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by the people the Highline was to be enlarged to an additional carrying capacity of 600 cubic feet per second to the district. The district claims this means 600 sec. ft. into the intake of the extension in addition to the river rights entitled to be carried in the Highline. This was changed to 500 second feet. The contract attempts to relieve Lucas from any and all obligation to complete or construct the Abbott and Terminal reservoirs which would depreciate the value of the $1,000,000 in bonds. The evidence showed that these reservoirs were a necessity, but the contract recited a false statement that the district would be best subserved by omitting these reservoirs, when in fact Lucas induced the directors to omit them because it would be to his financial advantage, though disastrous to the district. The original contract contains no provision authorizing the contractor to eliminate these reservoirs at his option for which the district might retain $325,000 in bonds. It contains a clause that if the promotion company fails to complete these reservoirs according to the plans and specifications attached, it shall be liable in damages on its bond and that not less than the estimated amount specified in the contract, viz. $325,000 in bonds, shall be retained by the district along with the 15% to be retained on the work done on such reservoirs, clearly showing that it was not the intention that the contractor might omit them at his pleasure. The canal with the extension is over 100 miles long and the Antero reservoir over 200 miles from the land and it takes reservoir water about a week or ten days to reach the land. It was found by the court, and is an admitted fact, that the irrigation district would on this account be a failure without reservoirs in the district to equalize the distribution of the water. The contract, plans and specifications of E. E. Baker adopted by the district call for these distributing reservoirs, and we find that the district board was without power to make a contract eliminating them. Even if it had, the reservoir company was not bound under its December 14, 1912 contract with Lucas to convey the property and accept the bonds in payment

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until he completed the system in accordance with the August 30, 1910 contract. Another change attempted was that Lucas was to construct the Antero reservoir to an additional capacity of 85,600 acre-feet instead of 71,000 acre-feet for which he was to receive $39,000 in bonds for this additional work, clearly beyond the power of the directors. The plans and specifications voted upon and according to which the system was to be delivered to the district were the plans and specifications prepared by E. E. Baker attached to and made a part of the original contract. By the February 3, 1913 modification the directors and Lucas contracted that whatever plans and specifications their engineers should afterward agree upon should be the plans and specifications of the system instead of the plans and specifications prepared by E. E. Baker and voted upon by the people. In this way other plans and specifications were to govern than those attached to the original contract, the contract voted by the people could be changed, and under the modification many important changes were made which vitally affected the district. This was an attempted delegation of power to others authorizing them to materially change the system after it had been adopted by a vote of the people. The district court found that the February 3, 1913 contract was illegal, in which we concur.

This assignment to Lucas of the promotion company's district contract required no ratification by the district and was assignable without its consent. The contract simply called for a completed system and it was immaterial by whom it was completed. So, we are to be controlled in this action by the August 30, 1910 contract as it was amended by the supplemental agreement August 29, 1912 between the district and the promotion company, which was assigned to Lucas December 30, 1912, and the December 14, 1912 contract between Lucas and the reservoir company.

6. Was the court right in denying Lucas or plaintiffs specific performance of the contracts?

The contract, specific performance of which is sought, expired by lapse of time January 1, 1914, more than two

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years before this suit was brought, and the district, by a vote of the people in 1915, declared it abandoned and forfeited. Specific performance is not a matter of right, but of grace, and a court of equity will not be swift to enforce specific performance of a contract that has been allowed to expire by lapse of time, and that has been defaulted and forfeited.

There is another reason; Lucas did not bring this action in his own name, but caused it to be instigated in his interest and for his benefit against the other defendants and himself, and he, though a nominal defendant, should be treated as a plaintiff prosecuting the case against the reservoir company. A suit for specific performance of this contract by the reservoir company or the district brought either jointly or severally against Lucas or plaintiffs could not be maintained. Therefore, a suit by Lucas or plaintiffs for specific performance against the reservoir company is lacking in mutuality and cannot be maintained. As a general rule a contract cannot be enforced by specific performance against one of the parties unless the remedy is mutual. This contract is incapable of enforcement in equity by the reservoir company against Lucas, therefore his suit against the reservoir company is lacking in mutuality of remedy. It is said: "contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction, with the exercise of special knowledge, skill or judgment in such oversight, are not, as a rule, specifically enforced." It is held as a rule by the weight of authority that an action for specific performance of a contract like this cannot be maintained unless plaintiff could be compelled in a court of equity at the suit of the defendant to perform it on his part. The remedy must be mutual. *Texas & St. L. Ry. Co. v. Rust,* (C. C.) 17 Fed. 275; *Strang v. Richmond P. & C. R. Co.* (C. C.) 93 Fed. 72; *Strang v. Richmond P. & C. R. Co.*, 101 Fed. 511, 41 C. C. A. 474; *Lucas v. Milliken* (C. C.) 139 Fed. 816; *Taussig v. Corbin,* 142 Fed. 660, 73 C. C. A. 656; *Shubert v. Wood-*

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ward, 167 Fed. 47, 92 C. C. A. 509; *La Hogue Drainage Dist. No. 1 v. Watts,* 179 Fed. 690, 103 C. C. A. 236; *Pantages v. Grauman,* 191 Fed. 317, 112 C. C. A. 61; *Leonard v. Board of Directors Plum Bayou Levee Dist.,* 79 Ark. 42, 94 S. W. 922, 9 Ann. Cas. 159; *Caldwell v. Donaghey,* 108 Ark. 60, 156 S. W. 839, 45 L. R. A. (N. S.) 721, Ann. Cas. 1915B, 133; *Iron Age Pub. Co. v. Western Union Tel. Co.,* 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758; *Electric Lighting Co. of Mobile v. Mobile & Spring Hill Ry. Co.,* 109 Ala. 190, 19 South. 721, 55 Am. St. Rep. 927; *Tombigbee Valley R. R. Co. v. Fairford Lumber Co.,* 155 Ala. 575, 47 South. 88; *Roquemore v. Mitchell Bros.,* 167 Ala. 475, 52 South. 423, 140 Am. St. Rep. 52; *Jolliffe v. Steele,* 9 Cal. App. 212, 98 Pac. 544; *Lattin v. Hazard,* 91 Cal. 87, 27 Pac. 515; *Stanton v. Singleton,* 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; *Moore v. Tuohy,* 142 Cal. 342, 75 Pac. 896; *Los Angeles, etc., Co. v. Occidental Oil Co.,* 144 Cal. 528, 78 Pac. 25; *Pac., etc., Ry. Co. v. Campbell-Johnston,* 153 Cal. 106, 94 Pac. 623; *Chicago Mun. Gas Light Co. v. Town of Lake,* 130 Ill. 42, 22 N. E. 616; *Welty v. Jacobs,* 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98; *Gage et al. v. Cummings,* 209 Ill. 120, 70 N. E. 679; *Ulrey v. Keith,* 237 Ill. 284, 86 N. E. 696; *Launtz v. Vogt,* 133 Ill. App. 255; *Minnetonka Oil Co. v. Boyd,* 143 Ill. App. 479; *Bourget v. Monroe,* 58 Mich. 563, 25 N. W. 514; *Alworth v. Seymour,* 42 Minn. 526, 44 N. W. 1030; *Solomon v. Wilmington Sew. Co.,* 133 N. C. 144, 45 S. E. 536; *Fargo v. N. Y. & N. E. R. Co.,* 3 Misc. Rep. 205, 23 N. Y. Supp. 360; *Agens v. Koch,* 74 N. J. Eq. 528, 70 Atl. 348; *Roberts v. Braffett,* 33 Utah 51, 92 Pac. 789; *Kendall v. Frey,* 74 Wis. 26, 42 N. W. 466, 17 Am. St. Rep. 118; *Findley v. Koch,* 126 Iowa 131, 101 N. W. 766; *Wood v. Dickey,* 90 Va. 160, 17 S. E. 818; *Fowler Utilities Co. v. Gray,* 168 Ind. 1, 79 N. E. 897, 7 L. R. A. (N. S.) 726, 120 Am. St. Rep. 344; *Rutland Marble Co. v. Ripley,* 10 Wall. 339, 19 L. Ed. 955.

We are of the opinion that specific performance of the August 30, 1910 contract cannot be enforced in equity, and that the court was right in denying plaintiffs and Lucas

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any equitable relief.

7. Had plaintiffs capacity to bring this action? The contract expired by limitation January 1, 1914, and some time after that the directors, claiming that Lucas had done nothing but nominal work after June, 1913, declared it in default and the electors, by a vote of the district in 1915, with almost unanimity declared the contract at an end. This suit was brought January 15, 1916.

Under the statute unless the directors are denied the right to exercise the power, or it is reserved to the electors, all the powers granted an irrigation district must be exercised by the board of directors. Power and discretion in the matters under consideration are not granted to individual taxpayers or to the court but to a board of directors with a referendum in some instances reserved to the voters. The board of directors, and the district upon a referendum vote of the electors, had the discretion to make the August 30, 1910 contract, and to declare it forfeited, or to breach it, and in the absence of fraud individual taxpayers cannot interfere with that discretion. Where discretion may be exercised by a municipality, it must be done by constituted authority, and the courts cannot, at the instance of a taxpayer, interfere with the exercise of such discretion or substitute the judgment of the court for the judgment of those in authority. A taxpayer may protect the rights of the municipality against the unlawful increase of taxes which would throw an unlawful charge or burden upon his property, but he cannot by the exercise of discretionary power vested in others force additional burdens and taxes upon the taxpayers of the municipality. A taxpayer as a rule in the absence of fraud has no capacity to bring an action for the district against the will, discretion and judgment of the board and the district in whom are vested by statute the power and authority to exercise such judgment, neither can the court exercise the discretion vested by law in the board or the electors. Discretion exercised by the proper authorities, unless abused, cannot be reviewed by the court at the instance of a tax-

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payer. *City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467; *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 342; *Hildreth v. City of Longmont*, 47 Colo. 95, 105 Pac. 157; *Moffat et al. v. City and County of Denver*, 57 Colo. 473, 143 Pac. 577; *Thomas v. Grand Junction*, 13 Colo. App. 80, 87, 94, 56 Pac. 665; *Peake v. City of New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, 35 L. Ed. 131.

An individual taxpayer cannot compel the district to carry forward a project against the judgment and discretion of those in whom such matters rest by statute which would throw additional burdens upon the taxpayers. The contract price for the system was $3,000,000 in bonds which would represent a charge of $50.00 an acre upon the 60,000 acres. The amount of bonds outstanding represent a charge of $12.50 per acre. The district, in order not to make any further charge upon the land, cancelled the contract nearly two years after it had been defaulted and they claimed the work abandoned, and a taxpayer cannot force a tax of $37.50 on every acre of land in the district against the will, discretion and judgment of the board and a majority vote of the electors and taxpayers of the district. The board of directors claimed Lucas refused to complete the system according to the August 30, 1910 contract, plans and specifications; that he was in default; that the system he proposed to deliver under the invalid February 3, 1913 contract would be of no value to the district, and that it would be better to have a charge of $12.50 an acre on the land than to add a further charge of $37.50 an acre for what they considered was worthless. They declared the contractor in default and the contract forfeited and abandoned and submitted the matter to the electors of the district who almost unanimously approved the action of the board. Notwithstanding this, a taxpayer and land owner assumes to exercise the discretion vested in the board of directors and the district in such matters and claims the right to enforce specific performance of the contract in a court of equity against the will of the district. The legislature never intended, in a matter of this kind, that the judgment and dis-

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cretion of an individual taxpayer, or the court, should be substituted for the judgment and discretion of the constituted authorities of the district. Courts as a rule refuse to take upon themselves the judicial superintendence and execution of the performance of this kind of a contract, but leave the parties in case of a breach to their legal remedies.

This is not in conflict with the doctrine that a taxpayer may bring an action to prevent the authorities of a municipality from paying out funds illegally, or from releasing obligations without consideration, or for relief against illegally refusing to perform duties which the law specifically enjoins and in which no discretion is to be exercised, or to prevent any act whereby a loss would be brought to the municipality when the act sought to be done is beyond the power of the authorities, or, under certain conditions, to enforce contracts for the payment of money, where the contracts are such that the performance or non-performance is a matter over which the municipal authorities have no discretion, but we know of no case sustaining a taxpayer's action brought against the discretion and judgment of the constituted authorities, vested by statute, with the power of exercising such judgment and discretion.

The findings of the lower court will be set aside, the judgment reversed and the cause remanded with directions to the lower court to dismiss the action without prejudice to the contract rights of the parties and their legal remedies.

MR. JUSTICE SCOTT, MR. JUSTICE TELLER, MR. JUSTICE BURKE and MR. JUSTICE DENISON concur in the conclusion.

MR. JUSTICE BAILEY and MR. JUSTICE ALLEN dissent.

On Petition for Rehearing.

GARRIGUES, C. J.

It is stated in paragraph 7 of the opinion that "A taxpayer as a rule in the absence of fraud has no capacity to bring an action for the district against the will, discretion and judgment of the board and the district in whom are

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vested by statute the power and authority to exercise such judgment, neither can the court exercise the discretion vested by law in the board or the electors."

By this it is meant, as stated in the opinion, that they had no right to bring or maintain the action for the reasons therein given, and not that they were incapacitated under the Code from bringing the suit.

No. 9557.

FORT v. THE DENVER & RIO GRANDE RAILROAD CO.

Decided January 10, 1921.

Action against carrier for damage resulting from freezing of potatoes in transit. Motion of defendant for judgment on the pleadings, sustained.

Affirmed.

1. RAILROADS—*Rates and Regulations—Attack.* The validity of the rates and regulations of a common carrier cannot be determined by a court in an action for damages by a shipper; so long as operative they are binding upon both and will be enforced in fixing the liability of the parties.

   The shipper has a right in any appropriate proceeding to attack the rate, regulation or classification.

2. *Liability for Damage to Goods by Freezing.* Under the common law a carrier is not liable for losses or injuries resulting from the inherent nature of the goods, which would not have been prevented by the exercise of ordinary care upon its part.

   Under this rule freezing of potatoes will be held to be caused by the nature of the property so as to exempt the carrier from liability, provided it has been guilty of no previous negligence or misconduct which can be considered the proximate cause of the injury.

Error to the District Court of the City and County of Denver, Hon. John A. Perry, Judge.

Messrs. ALLEN & WEBSTER, for plaintiff in error.

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Mr. E. N. CLARK, Mr. J. G. MCMURRY, for defendant in error.

MR. JUSTICE SCOTT delivered the opinion of the court.

THIS action is by the plaintiff in error to recover damages from the defendant in error by reason of alleged negligence in permitting portions of several carloads of potatoes to freeze while in transit.

The complaint alleged the shipment of five carloads of potatoes from within the state of Colorado to points beyond the state delivered to the defendant as the initial carrier and to be transported over connecting lines. The claim for damages to each carload is made a separate cause of action. Four of these counts only are involved here and for the purposes of this review may be considered as one.

The facts as they relate to the first count only will be considered. It is alleged that the plaintiff on November 12, 1915, delivered to the defendant a car load shipment of potatoes at Del Norte, Colorado, for carriage to Pueblo over defendant's road, and thence over connecting lines to Waco, Texas, under contract witnessed by a certain bill of lading. That the temperature at the time of delivery to the carrier and acceptance by it was not such as to freeze the potatoes in the car, several hundred pounds of straw having been placed in the car for protection from the ordinary temperature existing at Del Norte. That in the carriage of potatoes so encased in straw in the winter time in moderate weather, it is sufficient to close the vents of the car, but when very low temperatures are encountered, due care and diligence upon the part of the carrier require that some artificial heat be supplied by the carrier and that oil stoves are usually and customarily supplied by the carrier for such purpose so as to deliver said potatoes without damage at the point of destination.

The complaint then alleges that in this case such low temperatures were encountered that due care and caution upon the part of the defendant required that artificial heat should have been supplied to prevent the freezing of the

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potatoes, but that the defendant wholly neglected to furnish such artificial heat and thus negligently permitted a large portion of such potatoes to freeze, for which damages are asked.

Demurrer was filed against the complaint upon the ground chiefly that it did not state facts sufficient in law to constitute a cause of action, and specifically:

"Because the complaint shows that the shipment in each of said causes of action was in transit in interstate commerce and moved under contract, under which circumstances the federal statutes require that the rights of both plaintiff and defendant be determined by the contract and the tariffs in force at the time, and not otherwise; and the complaint fails to set forth any violation of the contracts or the tariffs applicable to such shipments; because the matters of which complaint is made are that defendant failed to provide artificial heat in violation of an alleged common law duty, but said complaint as to each of said causes of action fails to allege that the tariffs, contracts, rules and regulations made by the parties or promulgated by the Interstate Commerce Commission, or ratified by the Commission, provided for or imposed any duty in regard to furnishing artificial heat."

This demurrer was overruled.

The answer admits the shipment of the potatoes as alleged and sets forth the bill of lading. The Interstate Commerce Act is then pleaded together with supplemental and amendatory acts thereto and tariffs and regulations thereunder, provided by the Interstate Commerce Commission; alleges compliance with all such acts and regulations, and that the rates and regulations relating to the particular transaction were in accord with the Interstate Commerce Commission rules.

It also pleads Western Classification 53 by that body, and Rule 30 thereunder, providing:

"that the ratings provided for freight in carloads do not obligate the carrier to furnish heated cars, nor to maintain heat in cars for freight requiring such protection except

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under such conditions which the carrier's tariffs provide, and that stoves used in cars and the fittings and fuel therefor must be furnished by the shipper, and that the stoves must be securely fastened and piped and arranged in certain manner described, and that the shipper must provide attendants to care for the fire, and that the carrier will pass a man free, one way, for the purpose of attending to the fire. That said Western Classification 53 sets forth at pages 87 to 90 the standard bill of lading referred to."

It is further alleged:

"That said Southwestern Lines' Classification, Exceptions, etc., No. 1-F, provides in item 36, page 52, that during October, November, December, January, February, March, and April, when in order to protect perishable freight from frost it becomes necessary to provide stoves and fires in cars containing potatoes and vegetables, caretakers' transportation will be furnished messenger actually in charge of and accompanying shipments from point of origin to points specified in the tariff, subject to the provisions that the car is protected by stove and fire, and that the caretaker is passed free in one direction, and under certain conditions one man will be returned. That said tariff provides in item 580, page 101, that stoves used to protect potatoes from frost may be handled free when accompanying the original shipment of potatoes provided the shipper at point of origin gives the carrier shipping instructions in the form of a bill of lading consigning such property to the consignee of the potatoes, and in the event that this is not done, the rate on the potatoes will apply to the stoves. And further provides that stoves or heaters to protect from frost will be returned free under the conditions and restrictions stated."

It is further alleged that said shipments were made under the said standard bill of lading and under such classifications; that said acts of Congress and rules, regulations and tariffs provided thereunder constitute the sole agreement under which the defendant received and transported the shipments; that plaintiffs did not furnish stoves, fuel or

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fittings for furnishing heat, nor an attendant as so provided, but on the contrary, plaintiff directed that said potatoes be transported under standard ventilation, and that standard ventilation does not require nor involve artificial heat, and therefore it was not the duty of the defendant to furnish artificial heat; that the defendant followed and carried out its said specific instructions and performed the services required of it by said contract and said laws, rules, regulations and tariffs concerning the same.

The replication admits the classifications and rules pleaded, but alleged that these provisions when considered in their entirety are directly "discriminating in favor of the larger shipper, and which provision as to all interstate shipments was contrary to the letter and spirit of the interstate commerce law referred to, and was illegal, null and void and of no effect whatsoever, whether filed and accepted by the Interstate Commerce Commission or not, and that none of said provisions in any manner relieved the defendant of liability for its negligence."

This allegation was ordered by the court to be stricken from the replication. Allegations of like effect in an amended replication were likewise ordered to be stricken.

The court then sustained a motion of the defendant for judgment on the pleadings, and judgment was rendered for the defendant accordingly.

The only question to be determined is whether or not under the facts and circumstances pleaded there was such a duty resting upon the defendant carrier as will create a common law liability.

It is clear that the only duty charged is failure to furnish heat. This was the issue involved in the motion to strike portions of the replication and the amended replication, as is case of judgment on the pleadings.

That the statutes and regulations and classifications approved by the Interstate Commerce Commission for shipments under the standard bill of lading impose no such duty is apparent.

It was not within the power of the court in this case to

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determine the validity of such regulations. The shipper has the right in any appropriate proceeding to attack the rate or classification, and if either or both are held to be unreasonable may secure relief either by reparation order of the Commission, or by suit in court. But so long as such rate, regulation or classification remains operative it is binding upon the shipper and carrier alike and is to be enforced by the courts in fixing the liability of the parties. *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 515, 34 Sup. Ct. 380, 58 L. Ed. 703.

The liability of a common carrier in case of an interstate shipment in view of the legislation of the United States Congress upon that subject is quite fully discussed and defined in *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. It was there said:

"What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage or injury to such property caused by it,' or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words 'any loss or damage,' would be to ignore the qualifying words, 'caused by it.' The liability thus imposed is limited to 'any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common law duty as a common carrier."

It may be noted that federal legislation upon the question of contracts for interstate shipments supersedes any legislative policy of the states that may have been enacted upon that subject. In the case of *Express Co. v. Croninger*, *supra*, it was said:

"That the legislation supersedes all the regulations and

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policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. *Northern Pacific Ry. v. State of Washington,* 222 U. S. 370; *Southern Railway v. Reid,* 222 U. S. 424; *Mondou v. Railroad,* 223 U. S. 1."

It is the rule of the common law that a carrier is not liable for losses or injuries resulting from the inherent nature of the goods, which would not have been prevented by the exercise of ordinary care upon its part, or for loss or injury to goods caused by an inherent defect in the goods themselves, the existence of which was unknown both to the shipper and the carrier. Under this rule it has been held that the freezing of potatoes by a carrier will be held to be caused by the nature of the property, so as to exempt him from liability, provided he has been guilty of no previous negligence or misconduct which can be considered the proximate cause of injury. Moore on Carriers, 2nd Ed., Vol. 1, page 336.

In the case at bar, the plaintiff knew that he was making the shipment during one of the months of the year named in the contract of shipment in which the carrier agreed to permit the use of stoves and the carriage of an attendant to keep up the fires for the furnishing of heat to prevent the very injury complained of, but elected not to do so and to rely upon the packing of the potatoes in straw for protection.

The principle of law as announced by the federal courts is quite well stated in the case of *The Prussia,* 88 Fed. 531,

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affirmed by the Supreme Court in 174 U. S. 803, 19 Sup. Ct. 885, 43 L. Ed. 1188. It was there said:

"It may very well be that whatever has a tendency to be injured by heat or by cold should be assigned to a place, in the distribution of the cargo, where its disposition would not be excited; but this would not require the carrier to create an artificial climate adapted to the preservation of goods, and to warrant that the heat or cold thus furnished should be unvarying and efficient. Such an obligation upon a common carrier never existed, and there is no judicial suggestion of its propriety. Assume, then, that a carrier undertakes to add the business of cold storage to his regular occupation. Here is a duty not imposed by law, a duty totally unknown to the peculiar obligations of common carriers. The principle which imposes the obligation of an insurer upon a common carrier has no relation to it. Dressed meat has a tendency to decay. It is the primary duty of the shipper to make such provisions as shall arrest such tendency or take the risk of the tendency. It is the primary duty of a common carrier, to the extent above stated, to introduce or to permit the introduction of no agency which will excite or develop such tendency. Aside from this he takes no risk. If the carrier undertakes the duty of the shipper, and thereby relieves the latter, the obligation must rest entirely upon contract, as the obligation of a common carrier does not require him to do so. This contract is quite collateral to the obligation of a common carrier, and hence may impose such full or qualified obligations upon the bailee as the parties to it determine."

Nor do we find the view of the State courts to be materially different. In *McGovern v. Ann Arbor R. R. Co.*, 165 Wis. 525, 162 N. W. 668, the facts were very similar to those involved in the case at bar. The opinion in that case closed with the following:

"The shipper did not choose to put a stove in the car under the conditions offered, but decided (by accepting the bill of lading) to assume the risks incident to an ordinary

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and expeditious transit of the car to its destination, one of the most obvious of which was the risk of freezing. The car went through expeditiously and on schedule time. The damage resulted not from delay nor from any act or omission of the defendant, but from the operation of a cause beyond the control of either party. In the published tariff of the defendant there is no provision for furnishing of heat in the transportation of vegetables or fruit; the rule hereinbefore referred to authorizing the shipper to furnish a man and stove is the only provision on the subject contained in the tariff."

In *Swetland v. Railroad,* 102 Mass. 276, the question was as to the negligence of the carrier in failing to furnish heat or otherwise prevent freezing. The court stated that there was no evidence of negligent delay, and continued:

"Nor is it contended that they expressly agreed to do anything to prevent the apples from freezing. At that season of the year (December 7) such property would be exposed to some risk of freezing if there should be a change of weather and any unusual detention of the train. But it is not contended that this was the risk of the carrier if he was guilty of no negligence."

In *Schwartz & Co. v. Erie R. R. Co.,* 128 Ky. 22, 15 L. R. A. (N. S.) 801, 106 S. W. 1188, the court said:

"Where the injury to the goods is due to their own inherent nature and from natural causes, such as freezing, without fault on the part of the carrier, he is not responsible. 6 Cyc. 381; *Wolf v. Express Co.,* 43 Mo. 421, 97 Am. Dec. 406; *McGraw v. Railroad Co.,* 18 W. Va. 361, 41 Am. Rep. 696; 5 Thompson on Negligence, Sec. 6456."

We find the trend of the decisions of both Federal and State courts, rendered since the enactment of the Interstate Commerce law, to be in harmony with the views herein expressed.

The judgment is affirmed.

MR. JUSTICE DENISON and MR. JUSTICE ALLEN concur.

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No. 9594.

THE PEOPLE EX REL. BROSIUS, ADMINISTRATOR, v. THE NATIONAL SURETY COMPANY.

Decided January 10, 1921. Motion to reinstate denied March 7, 1921.

Writ of Error Dismissed.

1. APPEAL AND ERROR—*Writ of Error—Time for.* Under rule 16, in force January 22, 1917, limiting the time for issuing writs of error to two years from the entry of judgment, the writ of error in this case was dismissed.

Error to the District Court of Pueblo County, Hon. J. E. Rizer, Judge.

Mr. S. D. BROSIUS, *pro se.*

Mr. M. G. SAUNDERS, Mr. E. F. CHAMBERS, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

THE judgment sought to be reviewed in this case was entered in the district court of Pueblo County, May 13, 1916. A writ of error to review the same was sued out May 12, 1919. At the time the judgment was entered, the rules of 1914 were in force, under which, by Rule 14, the time for suing out a writ of error was limited to one year. Rule No. 16 of the rules in force January 22, 1917, which was in effect when this writ of error was issued, limited the time for issuing writs of error to two years from the entry of the judgment.

Plaintiff in error was too late in bringing the cause to this court, and under the rules we are prohibited from considering the case.

The writ of error is therefore dismissed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE DENISON concur.

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No. 9600.

BIGGER v. HOLLWORTH.

Decided Jan. 10, 1921.

Action to rescind contract of sale. Judgment for plaintiff.

Affirmed.

1. VENDOR AND VENDEE—*Fraud—Misrepresentations.* The agent of the owner represented to a purchaser of property that it was listed with him for $1500 when in fact it was listed at the value of $800. *Held*, that this was a flagrant misrepresentation as to the sum for which the property could be purchased, and therefore as to value.

2. FRAUD—*Representations.* In the sale of a restaurant property the amount of income and profits derived from the business is peculiarly within the knowledge of the owner and the purchaser is justified in relying upon the representations of the seller in that respect.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. C. A. IRWIN, for plaintiff in error.

Mr. PERCY S. MORRIS, for defendant in error.

MR. JUSTICE SCOTT delivered the opinion of the court.

THE plaintiff in error, Frank Bigger, was the owner of a restaurant in the city of Denver, which he listed for sale with the Victor M. Cox Loan and Investment Company, one of the defendants below. Through the instrumentality of this agency, the restaurant was sold to the defendant in error, Anna E. Hollworth, for the sum of fifteen hundred ($1500) dollars, one-half of which sum was paid in cash and one-half by several promissory notes.

This action is by the defendant in error, Anna E. Hollworth to rescind the contract of sale upon the ground of fraud and deceit.

It appears that at the time, Mrs. Frank Bigger, wife of

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the defendant Bigger, was in charge of the restaurant, and admittedly the agent of Bigger.

The court made the following specific findings of fact:

"1. That Mrs. Frank Bigger, the agent of the defendant Frank Bigger, represented to the plaintiff before the plaintiff paid the purchase price for the restaurant business, property and good will described in the complaint, that the daily receipts of money from said restaurant were from sixty dollars to seventy-five dollars and better, and never less than sixty dollars.

2. That before the said purchase money was paid by the plaintiff for the said restaurant, the defendant Flavin, agent of the defendant, The Victor M. Cox Loan and Investment Company, stated to the plaintiff that the said restaurant was at that time listed with the defendants, The Victor M. Cox Loan and Investment Company at a price of fifteen hundred dollars.

3. That both of these representations were material representations, that they were false and known by the persons making them to be false, that they were made for the purpose of inducing the plaintiff to buy the restaurant, that the plaintiff was ignorant of the falsity of such representations and each of them, that the plaintiff had the right to and did rely upon such representations and each of them and bought the restaurant upon such representations and each of them."

Judgment for rescission was entered, for the repayment of the sum of seven hundred fifty ($750) dollars, and for the cancellation of the several promissory notes, together with the sum of $182.34 lost by the plaintiff while in charge of the restaurant. Bigger brings the cause here on error.

The principal contention of plaintiff in error is that a fatal variance exists between the pleading and proof as found by the court as to the misrepresentations upon which plaintiff relied.

Many fine distinctions are attempted and many authorities are cited, but a careful study of the pleadings and proof fails to sustain the contention. The pleadings and

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findings both state in substance the same fact.

It is urged that if the findings are true, they were insufficient in law to justify rescission. Flavin, the agent of the Cox Company, who transacted the matter with Mrs. Hollworth represented to her that Bigger had listed the property with the company at fifteen hundred ($1500) dollars, when in truth and in fact it was listed at the value of eight hundred ($800) dollars. This was a flagrant misrepresentation as to the sum at which the property could be purchased, and therefore as to value. *Pouppirt v. Greenwood*, 48 Colo. 405, 110 Pac. 195.

It is contended that Mrs. Hollworth was not justified in relying upon the representations made to her as to income and profits, but was bound to make investigation for herself. The amount of income and profits were matters peculiarly within the knowledge of the owner and in such case the purchaser is justified in relying upon the representations of the seller in that respect. 1 Black on Rescission and Cancellation, Sec. 118.

There are other assignments of error, all of which have been considered but are held to be without merit. Judgment affirmed.

MR. JUSTICE DENISON and MR. JUSTICE ALLEN concur.

No. 9640.

OLSON v. JOHNSON, ET AL.

Decided January 10, 1921.

Proceeding involving attachment levy on real property. Attachment dismissed.

Affirmed.

1. ATTACHMENT—*Levy on Real Estate—Title.* An attachment on land alleged to belong to a judgment debtor, was properly dismissed

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where the evidence failed to disclose that he ever had legal or equitable title to the premises.

Error to the District Court of Phillips County, Hon. H. P. Burke, Judge.

Mr. W. D. KELSEY, for plaintiff in error.

Messrs. COEN & SAUTER, for defendants in error.

Department Two.

PER CURIAM.

THE plaintiff in error secured a judgment against the defendant in error, Hans Johnson, in the County Court of Phillips County. Attachment was issued against the property of the said defendant. Levy was made upon a certain tract of land.

Thereafter the defendant in error, Manuel Anderson, filed his petition in intervention claiming ownership of the tract levied upon. The case was certified to the District Court and the issue tried.

The court found that at the time the levy was made, the defendant Johnson was not the owner of the land nor of any interest therein, and dismissed the writ of attachment.

Examination of the evidence fails to disclose that the said defendant Johnson ever had legal or equitable title to the premises.

The judgment is affirmed.

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No. 9667.

KILLIAN v. MCCOURT.

Decided Jan. 10, 1921.

Action for personal injuries sustained in an automobile accident. Judgment for defendant.

Affirmed.

1. EVIDENCE—*Inconsistent with Admitted Facts.* The conclusion of a witness which is so at variance with admitted facts as to be incongruous, should receive no consideration.

2. NEGLIGENCE—*Last Clear Chance.* Evidence reviewed and held insufficient to carry the cause to the jury under the doctrine of last clear chance in favor of one admittedly guilty of negligence continuing to the moment of the accident.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. E. M. SABIN, for plaintiff in error.

Mr. WILLIAM E. HUTTON, Mr. BRUCE MCCAY, for defendant in error.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error brought this action against defendant in error for personal injuries sustained in an automobile accident at the intersection of Broadway and Thirteenth Avenue in the City of Denver. Judgment having been entered against her on a directed verdict she brings the cause here for review.

Defendant was driving his automobile South on Broadway. A street car passing in the opposite direction had made a "far side stop" at the Thirteenth Avenue crossing. Plaintiff, either just before or immediately after this street car started up, hurriedly crossed Broadway, south of it, with both her hands up, holding her hair and her coat, and without glancing in either direction or taking the slightest precaution from the moment she left the curb until the

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car struck her. At the time of the collision she had not seen the automobile and did not even know what it was. Her negligence is undisputed. The sole point here necessary to determine is her right to go to the jury under the doctrine of the "last clear chance;" it being contended that there is evidence that defendant could, by the exercise of reasonable care and diligence, have stopped his car after plaintiff's peril was apparent. The basis for this contention is defendant's estimate that he was approximately twenty-five feet from plaintiff when he first saw her, and the testimony of a mechanic that the car could, under certain ideal conditions not here established, have been stopped in approximately ten feet. The only reliable evidence concerning the speed at which defendant was traveling is that given by himself and other passengers, and is all to the effect that that speed was not in excess of ten miles per hour. Plaintiff concluded otherwise, but in view of admitted facts that conclusion was so incongruous that it could receive no consideration. *Westerkamp v. C. B. & Q. Ry. Co.*, 41 Colo. 290, 297, 92 Pac. 687.

To offset this we have the testimony of the mechanic, above referred to, from which plaintiff's counsel draws the conclusion that the defendant either did not put forth every possible effort to avoid the collision after he discovered the peril of plaintiff, or that he was in fact traveling at an excessive rate of speed. Plaintiff and his passengers testify that every possible effort was made to avoid the accident. The testimony of the mechanic does not indicate whether his estimate of the distance of ten feet required to stop this car includes or excludes the time necessarily required to shut off the power and apply the brakes. Those acts, if they occupied but a second, would cover a greater space than the time he allows for stopping the car. After they were performed his estimate does not allow one second of time to bring the car to a full stop. We are therefore asked to say that this guess of the witness, involving such a doubtful performance and based upon defendant's guess as to the interval separating the car and the plaintiff when

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her peril was discovered, is sufficient to carry the cause to the jury under the doctrine of the "last clear chance," in favor of one admittedly guilty of negligence continuing to the moment of the collision. This we cannot do.

Denver City Tramway Co. v. Cobb, 164 Fed. 41, 43, 90 C. C. A. 459. Had a verdict for plaintiff been returned it would have had no basis save conjecture.

Finding no reversible error in this record the judgment is affirmed.

MR. JUSTICE SCOTT, (sitting for MR. CHIEF JUSTICE GARRIGUES), and MR. JUSTICE TELLER concur.

No. 9676.

MILLAGE ET AL. *v.* CHURCHILL.

Decided January 10, 1921.

Action to quiet title. Judgment for plaintiff.

Affirmed.

1. DEEDS—*Construction.* In construing written instruments courts should seek for and give effect to the actual intent of the parties, when such intent is manifest.

2. APPEAL AND ERROR—*Construction of Deed—Parol Evidence.* In an action involving the effect of a limitation clause in a warranty deed, it was not error to exclude testimony proffered as to prior declarations of the deceased grantor relative to disposition of the property, when it was apparent that the terms of the limiting clause were repugnant, hopelessly conflicting and incapable of being harmonized by parol testimony.

3. DEEDS—*Limitation Clause—Construction.* In the construction of a warranty deed containing a limitation clause the terms of which are too indefinite, conflicting and ambiguous to permit of interpretation and enforcement with any degree of certainty as to the real intent and purpose of the grantor, the granting clause, which is clear and unequivocal, will control.

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Error to the District Court of Phillips County, Hon. H. P. Burke, Judge.

Messrs. MUNSON & MUNSON, for plaintiffs in error.

Messrs. ALLEN & WEBSTER, Mr. LOUIS H. DRATH, for defendant in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

THIS action is in the nature of a suit to quiet title, wherein Ida Churchill, formerly Ida Millage, sought to have construed a deed executed to her by Jacob Millage, she being then his wife. Shortly after the execution and delivery of the deed Jacob died. Later this action was brought to have it determined whether the deed conveyed to Ida a title in fee or only a life estate. The trial court held that the deed conveyed the land in fee, and defendants bring the cause here for review on error.

No witness was sworn at the trial. It was stipulated, however, that if certain witnesses were present and testifying it would in effect be shown: That Jacob Millage, the grantor in the deed, married the plaintiff some eight or ten years prior to the execution of the deed; that she was his second wife; that Jacob had five children living by his first wife, and none by his second; that the deed was executed during his last illness and shortly before his death; and according to his prior statements Jacob intended to convey to his wife a life estate only in the land, with remainder over to his children, and that he consulted an attorney who was to draw the deed in question to effect such intent. This evidence was rejected, except as to that which tended to establish the fact that an attorney had dictated the conveyance in part, at least, particularly the so-called limitation clause.

The deed is on a printed warranty deed form, and recites that the grantor "has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part,

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his heirs and assigns forever" the real property involved. "To have and to hold such premises above bargained and described with the appurtenances thereunto belonging unto the party of the second part, his heirs and assigns forever." The deed carries the usual covenants of warranty.

Written into the instrument, following the description of the land conveyed, is this clause:

"This deed is in fee simple during the life of the said second party, and at the death of the said second party, the said Ida Millage, the title to said land above described shall descend to and vest in the legal heirs of the said first party, the said Jacob H. Millage."

The question is whether the conveying clause of a deed governs the construction of the instrument, or whether the whole document should be considered together, and effect given to the intent of the grantor, if clearly indicated. There is a wealth of authority for the rule that the granting clause controls, when plain and specific, to the exclusion of any attempted limitation thereafter injected into the deed. We are unwilling, however, to follow or approve these authorities, but are rather in accord with the more modern rule, which holds in effect that, in considering written instruments, courts should seek for and give effect to the actual intent of the parties, when such intent is manifest. The leading case in support of this proposition is *Johnson v. Barden*, 86 Vt. 19, 83 Atl. 721, Ann. Cas. 1915A, 1243. The question then recurs, What was the intent or purpose of the grantor in the execution and delivery of this deed?

The instrument by its granting clause, conveys the land to the party of the second part, her heirs and assigns forever. The words "heirs and assigns forever" are universally used and recognized as terms which characterize and in fact constitute a fee simple estate, as distinguished from lesser ones. And in the *habendum* clause the grant above set out is confirmed in apt and specific language. With the exception of the statement after the description of the land that "this deed is in fee simple during the life of the

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said second party, and at the death of the said second party, the said Ida Millage, the title to said land above described shall descend to and vest in the legal heirs of the said first party, the said Jacob H. Millage," the deed is an ordinary warranty deed, and conveys the land in fee. This limitation, if such it may be termed, contains conflicting provisions, capable of different plausible interpretations. Under such circumstances the court would be wholly unwarranted in attempting therefrom to determine and declare what the precise intention of the grantor was. Moreover, the clause does not purport to be a statement of intention, but rather of opinion as to the effect of the conveyance, which opinion being repugnant to the well settled meaning of the specific terms of the grant, and conflicting in its own terms, should not be recognized as in any way affecting the grant actually made. Had the limitation clause been clear and specific, indicating an indubitable intent and purpose to grant a life estate only, as was the case with the deed involved in *Johnson v. Barden, supra,* then the master rule of intent might well be applied. Not, however, we think, upon the facts of this case.

It was not error on the part of the trial court, under the circumstances, to exclude the testimony proffered as to prior declarations of the grantor, since it is apparent that nothing thus tendered could have made clear what the actual intention and purpose of the limitation was, since it is repugnant in its terms and hopelessly conflicting, and therefore incapable of being made plain and harmonious by parol testimony. Moreover, the offer was to show declarations of the grantor relative to a proposed disposition of the property, not declarations tending to throw light upon or explanatory of the limitation clause actually appearing in the deed. Manifestly under such circumstances the court should be limited to a consideration of the terms actually employed in construing and giving effect thereto. We regard these as being too indefinite, conflicting and ambiguous to permit of interpretation and enforcement with any degree of certainty as to the real intent and purpose in their

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use by the grantor. To hold that this deed conveys a life estate only would be in effect to make a deed for the grantor, without being certain of his intent and purpose in the conveyance, except as advised by the terms of the granting clause, which are clear and unequivocal, and under the facts and circumstances of this case should in our opinion control.

Judgment affirmed.

MR. JUSTICE DENISON dissents. MR. JUSTICE BURKE not participating.

MR. JUSTICE DENISON dissenting.

I cannot agree with the majority opinion.

First,—It was error to reject the testimony of Carl Millage. There was nothing in his testimony that did not show the circumstances under which the deed in question was prepared and executed. It is true of all contracts that they not only may but ought to be construed in the light of the circumstances of their execution,—and to that end oral testimony is always competent. *Killgore v. Cranmer*, 35 Colo. 485, 487, 84 Pac. 70; *Messenger v. German American Ins. Co.*, 47 Colo. 448, 453, 107 Pac. 643. I agree that it was right to exclude testimony as to the declarations of the grantor made prior to the deed. But the testimony of Carl Millage was not such.

Second,—I agree that we should follow the more modern rule expressed in *Johnson v. Barden*, 86 Vt. 19, 83 Atl. 721, Ann. Cas. 1915A, 1243. This court has already so declared. *El Paso County v. Colo. Springs*, 66 Colo. 111, 117-118, 180 Pac. 301, 304. But the intent of this deed seems clear to me, that is, to convey a life estate. The majority opinion gives the interpolation no force whatever; that violates the elementary rule that all parts of a deed should be given force, if possible, especially parts that are written into blank forms. The opinion also suggests that this interpolated clause is a mere expression of opinion as to the effect of the deed. The opinion of the grantor as to the effect of

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the deed is his intent. The interpolation was manifestly intended to qualify the deed.

Third,—It is said that the expression "* * * fee simple, during the life" is ambiguous and self-contradictory. So it is to a lawyer, but to one who does not know what "fee simple" means, (and it is evident the grantor did not) it would seem clear and consistent, and the intent is made unquestionable by the following words, which definitely provide for and determine a remainder. It is not conceivable that these words could be used by any one, lawyer or layman, without intent to limit the estate.

No. 9682.

McMILLEN v. YOST.

Decided Jan. 10, 1921.

Motion that a judgment be declared a lien on money belonging to defendant in possession of sheriff. Motion denied.

Reversed.

1. EXECUTION—*Levy on money.* Money may be levied upon under a writ of execution and shall be returned by the officer making such levy as so much money collected without sale.

2. JUDGMENT AND EXECUTION—*Money of Defendant in Possession of Officer—Procedure.* Where a defendant is taken into custody by the sheriff under a body judgment and he turns over to the officer for safe keeping money then in his possession, the proper procedure by the judgment creditor to secure the application of such money to the payment of his judgment is by motion, which is a proceeding in the action.

Error to the District Court of Pueblo County, Hon. Samuel D. Trimble, Judge.

Mr. B. C. DURALL, Mr. C. S. ESSEX, for plaintiff in error.

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No appearance for defendant in error.

MR. JUSTICE SCOTT delivered the opinion of the court.

THE plaintiff in error in an action in tort, obtained judgment against the defendant in error in the sum of ten thousand dollars. The judgment was based upon a verdict of the jury under instructions of the court finding $5,000 as actual and $5,000 as exemplary damages. Judgment of Imprisonment was entered and the defendant taken into custody by the sheriff.

At the time of his arrest the defendant had in his possession the sum of $250 in money which was taken into possession by the sheriff for safekeeping. Later, and upon the request of the defendant and upon the execution and delivery to the sheriff of an indemnity bond, the sum of money so taken from the defendant was delivered to a third person. Thereafter, the plaintiff filed his motion in the District Court reciting the facts above stated, and that the defendant was wholly insolvent, praying the court for a finding that the judgment was a first lien upon the said sum of money and directing the sheriff to pay the amount into court to be applied upon said judgment. This motion was denied. Neither the defendant nor the sheriff resisted the said motion in the trial court and neither has appeared in this court.

Money may be levied upon under a writ of execution and shall be returned by the officer making such levy as so much money collected without sale. Rev. Stat. 1908, Sec. 3615.

The motion of plaintiff was the proper procedure and was a proceeding in the action. *Hexter v. Clifford,* 5 Colo. 168.

The money was in possession of the sheriff when the plaintiff demanded that he make the levy. No other person than the defendant claimed title to it. It was the duty of the sheriff to have complied with the statute above cited.

The judgment is reversed with instruction to the trial court to sustain plaintiff's motion, and to enter an order

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requiring the sheriff to pay the money into court to be applied upon the judgment.

MR. JUSTICE DENISON and MR. JUSTICE BURKE concur.

No. 9720.

MARTIN v. CARRUTHERS.

Decided January 10, 1921.

Action for damages growing out of a collision between automobiles. Judgment for plaintiff.

Reversed.

1. PLEADING—*Sufficiency of Complaint.* Allegations of the complaint in an automobile collision case reviewed and held to state a cause of action.

2. AUTOMOBILES—*Law of the Road.* The law of the road requires each of meeting automobiles to turn seasonably to the right.

3. *Negligence.* The fact that one of the parties was at the left of the road, unexplained and unjustified, is conclusive of negligence.

4. EVIDENCE—*Sufficiency in Auto Accident Case.* While it is true that the failure of plaintiff to carry two headlights as required by statute, if unexplained or unjustified, was negligence *per se*, nevertheless, a verdict for plaintiff will not be disturbed on that ground if there is room for two opinions under the evidence as to whether such negligence was a contributing cause to the collision.

5. TRIAL—*Questions for Jury.* In an auto accident case, whether plaintiff drove too fast or neglected to lower his speed, are questions of fact for the jury.

6. APPEAL AND ERROR—*Refused Instructions.* In an action involving an automobile collision at night, where it appeared from the undisputed evidence that plaintiff's car did not carry two headlights, defendant was entitled to an instruction as to the effect upon the case of that circumstance, and the refusal of the court to give such an instruction when requested, was prejudicial error.

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7. PRACTICE—*Undisputed Facts not for the Jury.* It is bad practice to leave undisputed matters of fact to the jury as questions for their determination.

Error to the District Court of Phillips County, Hon. L. C. Stephenson, Judge.

Mr. W. D. KELSEY, Messrs. ALLEN & WEBSTER, for plaintiff in error.

Messrs. MUNSON & MUNSON, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

CARRUTHERS brought suit and recovered judgment below against Martin for negligence which resulted in an automobile collision on the road between Holyoke and Wray. Martin brings error and argues three points, First, that the amended complaint did not state a cause of action. Second, that the evidence is insufficient to sustain the verdict. Third, that Instruction No. 1, requested by the defendant, was wrongly refused.

As to the first, we think the complaint clearly states a cause of action. The essential allegations are:

That the plaintiff, in the night, was going south on the right hand or west side of the road, that defendant was going north on the same side of the road; that defendant drew a trailer, which was not known to the plaintiff; "that defendant, in total disregard of the law of the road, and the rights of the plaintiff and other travelers, continued on the wrong side of the road to a point close to the plaintiff before he undertook to turn out; that it was impossible for defendant to swing out of the road with his car a sufficient distance to carry the trailer which was behind the car out of said track located on the right hand side of the road, in which defendant was traveling when he approached plaintiff; * * * that by reason of the fact that defendant was traveling on the wrong side of the road, neglected to turn out and carried a trailer on his car, a collision occurred

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without any fault on the part of the plaintiff."

This is not model pleading but unquestionably stated a cause of action. The law of the road requires each to turn seasonably to the right. In some states, as Maine and New Hampshire, this is by statute, but the statute merely enacts the law. *Wright v. Fleischman,* 41 Misc. Rep. 533, 85 N. Y. Supp. 62, Affirmed, 91 N. Y. Supp. 16; *Daniels v. Clegg,* 28 Mich. 32, 45.

The fact that a party was at the left of the road, unexplained and unjustified is conclusive of negligence. *Larrabee v. Sewall,* 66 Me. 376; Cooley on Torts, p. 666; *Neal v. Rendall,* 98 Me. 69, 73, 56 Atl. 209, 63 L. R. A. 668. See also *Brooks v. Hart,* 14 N. H. 307, 310; *Angell v. Lewis,* 20 R. I. 391, 39 Atl. 521, 78 Am. St. Rep. 881. An allegation that defendant negligently and carelessly stayed on the left hand side of the road to a point so close to the plaintiff that it was impossible for the defendant to turn out quick enough to give the plaintiff his right of way, would be a good statement of negligence, and we think the allegations above quoted were equivalent to it. A much better form for a complaint of this kind may be found in Archbold's Nisi Prius, 649. See also 13 Enc. Forms, pp. 37-39 and 2 Boone C. Pl. p. 309, form 394. The skillful use of approved forms of pleading expedites court business very greatly.

As to the second point the principal reliance of the plaintiff in error is that contributory negligence was practically uncontradicted. He correctly claims that the failure of the plaintiff to carry two lights, as required by the statute, if unexplained or unjustified, was negligence, *per se,* but there is room for two opinions under the evidence as to whether that negligence was a cause contributing to the collision. It follows that we cannot disturb the verdict on this ground.

Whether plaintiff drove too fast or neglected to lower his speed were questions of fact for the jury. *Muehlbauer v. Klokner,* 161 Wis. 410, 154 N. W. 624.

As to the third ground, we think the court should have given the instruction required. The wife of the plaintiff,

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who was with her husband in his car, had testified that he had turned slightly to the right to avoid the defendant's car, and that, as he swung back into the track, he hit defendant's trailer, and it was claimed by defendant's counsel that the absence of the left headlight prevented plaintiff seeing the trailer in time to avoid it. There was also evidence that tended to show that the defendant was misled as to the position of plaintiff's car by the fact that plaintiff carried but one headlight. These were matters for the jury.

The defendant, in effect, requested the court to instruct the jury that the absence of plaintiff's left headlight, if the collision would not have taken place without it, either because it misled the defendant as to the location of plaintiff's car, or because it led the plaintiff to turn into the trailer, would prevent a verdict for plaintiff, but the instruction was refused. The defendant was entitled to an instruction as to the effect upon the case of a failure of the plaintiff to carry two headlights. This was a vital point in defendant's case, perhaps the strongest point in his defense, and its effect should have been made clear to the jury.

Instruction No. 8, which was given by the court, did not do this. It was as follows:

If you believe from the evidence in this case that the plaintiff's car was only equipped with one white light, and that defendant's car was equipped with two white lights, and that the plaintiff knew that the defendant was approaching the plaintiff's car in an automobile, and that plaintiff was driving his car at a great rate of speed, which would lead any reasonable person to apprehend danger of collision, and that the plaintiff seeing such condition in no manner attempted to avoid a collision by changing the direction of his car if the same could have been reasonably done, or reducing his speed, then the plaintiff is guilty of contributory negligence in this case and cannot recover.

This, in effect, said that if the plaintiff's car carried but one light, and if plaintiff was driving it at a great rate of speed, which would lead any reasonable person to appre-

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hend danger of collision, and if plaintiff saw such danger and could reasonably have avoided a collision by changing direction yet did not do so, he could not recover.

It is true that under those conditions the plaintiff could not recover, but the instruction does not accurately state the law for the purposes of this case, because the failure to carry two white headlights, if it so contributed to the collision that the same would not have taken place without it, was in itself enough to preclude recovery by the plaintiff, regardless of any other matter of negligence; such was the effect of the instruction requested by the defendant and it should have been given. *Marsh v. Cramer*, 16 Colo. 331, 27 Pac. 169.

We again suggest that it is bad practice to leave undisputed matters of fact to the jury, as questions for their determination. Instruction No. 8 is open to this objection, in that it submits to the jury as a question the undisputed fact that one of plaintiff's headlights was missing. This is perhaps not prejudicial error in the present case but it should be avoided. *Colo. Spgs. Co. v. Cohun*, 66 Colo. 149, 180 Pac. 307. The refused instruction put the matter properly.

The judgment should be reversed and the case remanded for a new trial.

MR. JUSTICE TELLER and MR. JUSTICE SCOTT concur.

No. 9723.

WAGMAN v. KNORR.

Decided January 10, 1921. Rehearing denied March 7, 1921.

Action for damages growing out of an assault and battery. Judgment for plaintiff.

Affirmed.

1. APPEAL AND ERROR—*Mistrial.* If the court erroneously declares a mis-

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trial and discharges the jury in a damage case, the error is corrected by the granting of a new trial.

2. *Verdict on Conflicting Evidence.* A verdict based on conflicting evidence will not be disturbed on review.

3. ASSAULT AND BATTERY—*Motive—Evidence.* Motive is always relevant to the question whether one did what is alleged against him and to the reason why. It is a state of mind. The previous relations of the parties to any transaction may have been sufficient to excite motive and if they tend to do so, however faintly, they are relevant. In the admission or rejection of such evidence, something must be left to the discretion of the trial court, the weight and effect being for the jury.

Error to the District Court of the City and County of Denver, Hon. John A. Perry, Judge.

Mr. WILLIAM H. DICKSON, for plaintiff in error.

Messrs. MELVILLE, MELVILLE & WALTON, Mr. CHARLES C. SACKMAN, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

UPON the third trial of this case, Knorr, the plaintiff below, had judgment against Wagman for assault and battery.

The plaintiff in error, Wagman, makes three points as ground for reversal, first, that before the completion of the second trial the court erroneously declared a mistrial and discharged the jury; second, that the evidence was not sufficient to support the verdict; third, that irrelevant, incompetent and immaterial evidence for the plaintiff was admitted.

As to the first point, if the court committed error the only way to correct it was to grant a new trial, and that the defendant has had.

As to the second point, the evidence is conflicting. That for the plaintiff is inconsistent with and some of it directly contrary to that of the defendant. We cannot disturb the

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verdict on this ground without usurping the function of the jury.

As to the third point: According to the evidence for the plaintiff he found Dorothy Knorr, his wife, sitting with the defendant in the defendant's automobile, near the middle of the street, at 2 o'clock in the morning and ordered her to get out; she got out, the defendant immediately followed her, and without provocation shot the plaintiff twice. After being shot the plaintiff returned the fire with two shots and afterwards the defendant fired two more in the direction of the plaintiff and his wife. The shooting of the plaintiff by the defendant constituted the assault for which suit was brought.

The defendant on the other hand, testified that he did not know the plaintiff; that the plaintiff approached the machine with a pistol, levelled it at the defendant, ordered him to throw up his hands, which he did; that the plaintiff then ordered his wife to get out of the machine, which she did; defendant immediately following her; that thereupon the plaintiff shot at the defendant, who returned the fire with three shots, two of which took effect; that the defendant believed his life in danger and fired in self-defense.

The plaintiff, over the objection of the defendant, was allowed to introduce evidence, with much detail, which need not be repeated here, to show that defendant and one Landry had, during the evening and night, been riding, drinking and lunching with plaintiff's wife and one Millie Knorr, his sister.

The court admitted this testimony as relevant only to the question of motive, and so instructed the jury.

It is now argued on the part of the defendant that these occurrences previous to the assault could have no bearing on the motive of defendant. We cannot say so. Motive is always relevant to the question whether one did what is alleged against him and to the reason why. Motive is a state of mind, e. g., fear, love, jealousy, anger, hatred, apprehension of danger, nervous excitement. The previous relations of the parties to any transaction may have been

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sufficient to excite motive and if they tend to do so, however faintly, they are relevant. In the admission or rejection of such evidence something must be left to the discretion of the trial court, *Com. v. Ferrigan,* 44 Pa. 386, the weight and effect of such evidence being, of course, for the jury. We cannot say that Wagman's previous conduct with plaintiff's wife and sister, under all the circumstances and in the peculiar position in which he found himself, had no effect upon his state of mind or conduct at the time of the encounter and therefore cannot say that the admission of the evidence in question was error or abuse of discretion. This matter is fully discussed by Mr. Wigmore, Wig. Ev., §§ 117, 118 & 385 to 406, esp. § 389. There are countless cases. One is *Tyler v. Nelson,* 109 Mich. 37, 39, 66 N. W. 671.

Judgment should be affirmed.

MR. JUSTICE SCOTT and MR. JUSTICE TELLER concur.

No. 9727.

BILLICK v. THE INDUSTRIAL COMMISSION OF COLORADO, ET AL.

Decided January 10, 1921.

Proceeding under the workmen's compensation act. Claim denied.

Cause Remanded with Instructions.

1. WORKMEN'S COMPENSATION—*Industrial Commission Findings of Fact.* It is the duty of the commission to make sufficiently detailed findings of fact so that the courts may determine whether the order or award is supported by the facts.

2. APPEAL AND ERROR—*Review of Evidence in Industrial Commission Cases.* The appellate court cannot review an industrial commission case on the evidence where any of the facts are in dispute.

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Error to the District Court of Pueblo County, Hon. James A. Park, Judge.

Mr. M. J. GALLIGAN, for plaintiff in error.

Mr. VICTOR E. KEYES, Attorney General, Mr. JOHN S. FINE, Assistant, Mr. WILLIAM E. HUTTON, Mr. BRUCE MCKAY, Mr. CHARLES M. ROSE, for defendants in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THE finding of the commission is as follows:

That the burden of proof is upon the claimant. That the claimant has not established his said claim by a preponderance of the evidence submitted herein and that he has not shown that he sustained any accident arising out of and in the course of his employment while performing services for the above named employer; or that the claimant's condition was or is the result of any accident sustained while in the course of his employment while working for the above named employer and that therefore the claim of the said John Billick should be denied.

This is substantially the same as the finding of the commission in the case of Prouse against the commission, decided at the present term.

In that case we said these findings were insufficient, but because the material facts in that case were undisputed, we considered the evidence as if it were the findings of fact.

In the present case although the evidence is greatly in favor of the finding of the commission, yet it is not wholly undisputed, and the law forbids us to consider it.

We therefore remand the matter to the District Court with directions to require the commission to make more specific findings of fact; among other things, whether the claimant had any disease, and, if so, what it was; whether any unexpected occurrence of any kind took place, and if so, whether it was the cause, or a contributing cause of the paralysis which seized the claimant, and what was the cause thereof.

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MR. JUSTICE SCOTT and MR. JUSTICE BURKE concur.

No. 9731.

CARROLL ET AL. v. THE INDUSTRIAL COMMISSION OF COLORADO, ET AL.

Decided December 6, 1920. Rehearing denied March 7, 1921.

Proceeding under the workmen's compensation act. Claim disallowed.

Reversed.

1. WORKMEN'S COMPENSATION—*Disease—Accident.* A workman in an alfalfa mill had organic heart disease. His strenuous labor of pitching hay in an enclosed building, combined with breathing the dust ladened air, brought on an attack of heart trouble causing instant death. *Held*, that death resulted from an injury proximately caused by accident, and that the dependents were entitled to compensation.

2. INDUSTRIAL COMMISSION—*Practice—Petition for Rehearing.* A claim before the industrial commission was denied. Petition for rehearing was filed and the commission vacated its first order, took further testimony and again denied the claim. *Held*, that it was unnecessary to file a second petition for rehearing before taking the case to the district court.

Error to the District Court of the City and County of Denver, Hon. Francis E. Bouck, Judge.

MR. CHARLES H. SHERRICK, for plaintiffs in error.

MR. VICTOR E. KEYES, Attorney General, MR. JOHN H. FINE, Assistant, MR. H. E. CURRAN, Messrs. DANA, BLOUNT & SILVERSTEIN, for defendants in error.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THE plaintiffs in error, as widow and minor children of

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Joseph Carroll, filed a claim for compensation with the Industrial Commission under the Workmen's Compensation Act. Joseph Carroll died while an employe and working as such. The plaintiffs in error filed their claim as his dependents. After a hearing, the Commission found, as a conclusion based upon the facts, that the death of Joseph Carroll "was not the proximate result of an accident sustained" by him.

The claimants filed an action in the District Court to set aside the order denying compensation. That court affirmed the order of the Commission, and claimants now bring the cause to this court for review.

One of the questions presented by the record is whether the Commission's finding, which in the instant case is one of law, can be sustained.

The following facts are not disputed: Joseph Carroll was employed in an alfalfa meal mill. On November 1, 1917 he was found dead, his body lying in the hay shed of the mill, where he had been pitching alfalfa hay. His work was hard physical labor. His place of employment was in an enclosed building. The air therein was dust laden as the result of handling hay, alfalfa meal, and machinery. The decedent had organic heart trouble. The evidence shows that the strenuous work of pitching alfalfa hay in an enclosed building, combined with breathing dust laden air, brought on an attack of heart trouble, causing instant death, and that if Joseph Carroll had been doing his work in the open air the work would not have brought on a heart attack.

The proximate cause of the death of Joseph Carroll was the condition of the air in his place of employment or the fact that it was dust laden. The question to be determined now takes this form: Under the foregoing facts, must it be held, as a matter of law, that the death was "accidentally sustained" or resulted from an "injury proximately caused by accident"?

The dust laden condition of the air was the "proximate cause" of the death because had it not been for such con-

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dition the death would not have occurred at the time. Such condition of the air, which decedent was required to breathe, brought on an attack of heart trouble, resulting in death. The dust laden condition of the air was the cause, and the fatal attack of heart failure was the result. The result was unexpected and unintended, and therefore an "accident." The term "accident" is often used "to denote any unintended and unexpected loss or hurt apart from its cause." 1 C. J. 395.

Our statute uses the expressions, "personal injury or death accidentally sustained," and "injury proximately caused by accident," in providing for what injuries or deaths compensation shall be allowed. By the term "injury" is meant, not only an injury the means or cause of which is an accident, but also any injury which is itself an accident. The expressions above quoted are the equivalent of "injury by accident," which is frequently used in the decisions. The word "by" may mean "through the means, act, or instrumentality of." 9 C. J. 1109. Therefore "injury by accident" and "injury caused by accident" are terms or expressions which can be used interchangeably. In a discussion of the former, it is said in 25 Harvard Law Review, 340:

"Since the case of *Fenton v. Thorley,* nothing more is required than that the harm that the plaintiff has sustained shall be unexpected. * * * It is enough that the causes, themselves known and usual, should produce a result which on a particular occasion is neither designed nor expected. The test as to whether an injury is unexpected and so if received on a single occasion occurs 'by accident' is that the sufferer did not intend or expect that injury would on that particular occasion result from what he was doing."

This is the rule followed in *Fidelity etc. Co. v. Industrial Accident Commission of California,* 177 Cal. 614, 171 Pac. 429, L. R. A. 1918F, 856. It was there stated that the current of authority is that "unforeseen, unexpected, and unintended injuries to employes have been classed as "accidents" and held sufficient to justify awards."

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For the reasons above indicated, we are of the opinion that the record shows that the death of Joseph Carroll resulted from an "injury proximately caused by accident," and that, therefore, his dependents are entitled to compensation.

It is contended by the defendants in error that the District Court had no jurisdiction to review the proceedings of the Commission, because no petition for a rehearing was filed by the claimants after the Commission last announced its denial of compensation. The facts which give rise to the controversy in this matter are as follows: On June 13, 1918 the Commission, after a hearing, made an order denying compensation to the claimants. A petition for rehearing was then filed. Thereafter, and on July 3, 1918, the Commission vacated its previous order, and set the cause down "for the purpose of taking further medical testimony as to the cause of death of the said Joseph Carroll and for no further purpose." Further evidence was taken on August 7, 1918. This evidence was cumulative only. On February 17, 1919, the Commission made an order, as if an original one, denying compensation. This order was, in effect, a reinstatement of the first order. No award in favor of the claimants had ever been made in the meantime. The petition for rehearing which was filed accomplished all that the statute contemplates with reference to such petitions. A second petition for a rehearing by the same party, filed after the Commission makes an order exactly the same as a previous order, would serve no purpose other than to further delay the termination of the proceedings.

The district court did not dismiss the proceeding, but took jurisdiction, and affirmed the award of the Commission.

Under the circumstances, above stated, we are of the opinion that the claimants should be deemed to have substantially complied with the statute as to filing a petition for rehearing.

The judgment of the district court is reversed and the cause remanded with directions to the district court to re-

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mand the case to the Industrial Commission with directions to enter an award allowing compensation to the claimants.

MR. JUSTICE BURKE and MR. JUSTICE DENISON dissent.

On Rehearing.

PER CURIAM.

The brief of defendants in error in support of their petition for rehearing is so discourteous that the Attorney General and his associates made haste to deny in writing all responsibility therefor. It is hereby ordered stricken from the files.

Reluctant to hold litigants responsible for such breaches of professional ethics, the court grants to defendants fifteen days from this date in which to file herein a proper brief in support of their petition for rehearing.

MR. JUSTICE ALLEN not participating.

No. 9738.

TARLING v. THE PEOPLE.

Decided Jan. 10, 1921.

Plaintiff in error was convicted of the larceny of automobile tires.

Reversed.

1. WITNESSES—*Cross Examination.* A wide latitude is allowed in the cross examination of witnesses upon matters which bear upon their credibility.

2. *Defendant in Criminal Case.* When a defendant in a criminal case offers himself as a witness in his own behalf, he is subject to the general rules of examination applicable to other witnesses, including examination as to matters which tend to show him unworthy of belief.

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3. *Examination of—Discretion.* Courts regard as an abuse of discretion the admission of any evidence in a criminal case the only reasonable effect of which would be to prejudice the jury against the defendant.

4. *Credibility—Former Conviction.* It is permissible to prove a former conviction of crime as bearing upon the credibility of a witness, but the showing must be limited to evidence of conviction. Questions as to indictment, arrest, commission of offenses or immoral acts, are not permitted.

5. *Credibility—Impeachment—General Reputation.* In impeaching a witness the inquiry should be to his reputation for truth and veracity, rather than to his moral character, and the inquiry should go to his general character or reputation for veracity, and not to specific acts.

Error to the District Court of the City and County of Denver, Hon. Greeley W. Whitford, Judge.

Mr. C. A. IRWIN, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. FORREST C. NORTHCUTT, assistant, for the people.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error and one Bogg were charged by information with the larceny of four automobile tires. Plaintiff in error having been granted a separate trial, was tried and found guilty.

The errors upon which he relies to reverse the judgment are: First, in the admission of incompetent evidence; and second, in the giving of an improper instruction.

The only direct evidence as to the guilt of the defendant was furnished by said Bogg, who testified directly that Tarling and he took the tires from a stolen automobile. A witness for the defendant gave testimony to the effect that Bogg had in fact stolen the tires.

The error alleged in the admission of the testimony consisted in requiring the defendant to answer the question,

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"Did you ever desert from the navy?"; a question which the witness answered in the affirmative.

Counsel urges that under the circumstances the question was peculiarly calculated to prejudice the jury against the defendant; that the case against him being made almost entirely by the testimony of Bogg it was vitally important to the defendant that nothing be introduced in evidence, not relevant to the crime charged, which would naturally prejudice the jury.

It is elementary that a wide latitude is allowed in the cross examination of witnesses upon matters which bear upon their credibility.

It is also established that when a defendant in a criminal case offers himself as a witness in his own behalf, he is subject to the general rules as to examination of witnesses, including examination as to matters which tend to show him unworthy of belief. *McKeone v. The People,* 6 Colo. 346.

While such is the rule as to accused persons when testifying in their own defense, the courts recognize that to introduce evidence of other offenses, which do not naturally bear upon the defendant's credibility, is an abuse of that discretion which the trial court must exercise in such examinations.

A review of the cases shows that courts regard as an abuse of such discretion the admission of any evidence, the only reasonable effect of which would be to prejudice the jury against the defendant. By the common law one convicted of a crime became thereby incompetent to testify; such conviction being regarded as conclusive that he was unworthy of belief.

The correctness of that conclusion has not been accepted in modern practice, but it is recognized that one convicted of a crime may be for that reason regarded as untruthful. This is evidenced by statutes, like that of our own state, by which it is permitted to show a conviction of crime as bearing on the credibility of a witness.

The showing, however, is limited to evidence of conviction, and questions as to indictment, arrest, the commis-

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sion of offenses, or immoral acts, are not permitted. *Tollifson v. The People*, 49 Colo. 219, 228, 112 Pac. 794; *Buel v. State*, 104 Wis. 132, 80 N. W. 78.

While the authorities are not in entire accord upon the question, the better rule seems to be that in impeaching a witness, the inquiry ought to be as to his credibility, his reputation for truth and veracity, rather than as to his moral character. The great weight of authority supports this rule.

In *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203, the court said:

"The rules of law do not allow specific acts of misconduct, or specific facts of a disgraceful character, to be proved against a witness by others. He may be proved * * * to have been convicted of infamous crimes, but not to have done other infamous deeds, nor to have undergone personal disgrace." To the same effect are *Drew v. State*, 124 Ind. 9, 23 N. E. 1098; *Britton v. Commonwealth*, 123 Ky. 411, 96 S. W. 556; *Gifford v. People*, 87 Ill. 210; *People v. Baird*, 104 Cal. 462, 38 Pac. 310; *Holbrook v. Dow*, 12 Gray 357; 40 Cyc. 2600.

The contrary view is based upon the theory of the kindred nature of vices. This involves the necessity for sanctioning the drawing of an inference from an inference. A witness having been shown to be dishonest, or immoral, it is inferred from that trait of character, that he is untruthful; then upon the inference that he is untruthful generally, it may be inferred that he is untruthful in the testimony which he has given. This violates the rule that an inference shall not be based upon an inference. It follows, therefore, that the impeachment should go to his general character, or reputation for veracity.

The objection to impeaching a witness by evidence of specific acts, is that all persons can be supposed ready to defend their general reputation for veracity, if attacked, but are not prepared at all times to defend as to a specific act.

To desert from the navy is a penal offense, but not rele-

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vant to the crime of larceny. Had the question been asked of a witness other than the accused, the most serious result would have been the discrediting of the witness; but when asked of the accused, the prejudice aroused by it directly affected the question before the jury.

In *Britton v. Commonwealth, supra,* it was held that on a trial for murder a question to the accused whether he had not killed a man in another state constituted prejudicial error, although it was limited at the time to the question of his credibility, and he denied the killing.

In *Elliott v. The State,* 34 Nebr. 48, 51 N. W. 315, in a trial on the charge of larceny, it was held error to ask the defendant whether he had not stolen a horse in Tennessee.

In *G., C. & S. F. R. Co. v. Johnson,* 83 Tex. 628, 19 S. W. 151, it was held error for the court to require a witness, over objections of the defendant, to state that he was a deserter from the United States Army. The court said, "A witness cannot be impeached in that way." If it was error as applied to an ordinary witness, much more is it so in case the accused is the witness thus interrogated, because of the different effect of it, as above stated. It is true that the extent of cross examination of witnesses is to be determined by the trial court in the exercise of its discretion, but it has many times been held that the admission of evidence of offenses not relevant to the issue, and which is likely to prejudice the jury against the accused, is an abuse of discretion, and is, therefore, error.

In *Buel v. State, supra,* it is said:

"It is one thing to honestly ask questions on cross-examination for the purpose of discrediting a witness, and quite another to ask questions of a witness who is a party, especially in a serious criminal case, for the purpose of injuring his cause in the eyes of the jury, and leading them to believe he was likely, because of his bad character, to have committed the offense charged."

Under the circumstaces of this case, it is impossible to say that the jury was not influenced by the evidence in question.

Objection is made also to the instructions, but as the

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judgment must be reversed because of the error above discussed, the instructions need not be considered.

The judgment is reversed.

CHIEF JUSTICE GARRIGUES and MR. JUSTICE BURKE concur.

No. 9744.

MOON v. GREENLEE, ET AL.

Decided January 10, 1921. Rehearing denied March 7, 1921.

Action against the owner of mining property to recover wages for labor on the property performed for a lessee. Judgment for plaintiffs.

Affirmed.

1. FRAUDS—*Statute of—Debt of Another.* Where one, to promote his own interest, promises to pay the debt of another, the transaction constitutes an original contract, and is not within the statute of frauds.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. BARNEY L. WHATLEY, for plaintiff in error.

Mr. E. L. CLOVER, for defendants in error.

MR. JUSTICE TELLER delivered the opinion of the court.

THE defendants in error, in their own right, and as assignees of four miners, brought suit against plaintiff in error to recover certain wages alleged to be due to the various parties, all of whom had been employed by The Bald Mountain Mines Company. Said company had a bond and lease on a mining property in Summit County, of which property the plaintiff in error was the owner.

The complaint alleges that the parties had refused to re-

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turn to work unless their wages were paid, and that on or about November 10, 1917, the defendant "then and there promised the said several parties that if they would return to work for the said corporation that, in consideration thereof, he would pay the said several parties their wages then due and what might accrue in the future; that in consideration of said promises and assurances on the part of the said defendant, then and there made, the said parties, and all of them, did return to work for the said corporation, and continued to work until the 24th day of November, 1917, when they and each of them were ordered by the said defendant to cease work."

The defendant in the action plead the statute of frauds, alleging that the promise counted upon was the promise to pay the debt of another, and void because not in writing.

Upon the trial of the cause there was testimony to support the allegations of the complaint, and to the effect that, when Moon learned that the miners had not been paid, and that in consequence thereof they were refusing to return to work, he said, in the presence of all of them, that he was interested in the property, and wanted it developed; and that, if they would return to work, he would pay the wages then due, and for such work as they might thereafter do. One witness testified that Moon said that if the men would take out another car of ore he would pay the full amount of their wages. They all testified that they returned to work because of these promises.

The defendant denied that he had made any such agreement in November, but admitted that he had made an agreement of that kind in October, after which, however, the company paid the men.

The court found for the plaintiff and entered judgment accordingly.

Plaintiff in error urges that the complaint does not state a cause of action upon an original agreement by plaintiff in error to pay the wages. We do not agree with this contention; the facts alleged constitute an original promise.

The case turns, then, upon whether or not, under the

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evidence, the defendant was bound upon an original contract. Every case in which the question here presented is involved depends, of course, upon the facts of that case. The test is whether or not a promise has been made as a surety of some debtor, or as an original undertaking by the promisor. In *Nugent v. Wolfe*, 111 Pa. 471, 4 Atl. 15, 56 Am. St. Rep. 291, it is said:

"It is difficult, if not impossible, to formulate a rule by which to determine in every case whether a promise relating to the debt or liability of a third person is or is not within the statute; but, as a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee, for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after, or at the time with the promise of the principal, is within the statute, and not binding, unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute."

In *Pizzi v. Nardello*, 209 Pa. 1, 57 Atl. 1100, it was held that a promise made by a surety for an original contractor to pay a subcontractor an amount due, and whatever might become due, for the purpose of inducing him to complete the work, he having refused to do so without such assurance, was a promise for the benefit of the promisor, and not within the statute; and such a promise is good though the original debtor is not released.

McLaughlin v. Austin, 104 Mich. 489, 62 N. W. 719, is to the same effect.

In *Fitzgerald v. Morrisey*, 14 Nebr. 198, 15 N. W. 233, it is held that a promise by a contractor to pay a laborer, who was working for a subcontractor, for work already done, in consideration that he would continue the work, is not within the statute, if the purpose was to gain some benefit for, or promote the interest of the promisor, and not to become a guarantor or a surety.

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McKeenan v. Thissel, 33 Me. 368, is directly in point. There a promise of an owner to pay past wages and future wages to laborers employed by a contractor, if they would continue the work, held not within the statute.

In *Mitchell v. Beck,* 88 Mich. 342, 50 N. W. 305, the principle is stated in another way. That is that if a promise is not given to secure credit for the debtor, but for the benefit of the promisor, the contract is original. The same rule is announced in *Spelts v. Anderson,* 67 Colo. 63, 185 Pac. 468.

From the record it clearly appears that plaintiff in error, being interested in the property and desiring to have it developed, made the promise to promote his own interest. This brings the case within the rule laid down in the cases cited, and in many other cases.

Counsel for plaintiff in error urge that the parties in whose interest the suit was brought did not release the mining company. This, however, is not material.

Plaintiff in error, having for his own benefit, contracted to pay the men, has no cause to complain that the mining company was not released.

The case was tried to the court, and the evidence fully justifies the findings and judgment. The judgment is accordingly affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BURKE concur.

No. 9748.

CARLSEN v. HAY, ET AL.

Decided January 10, 1921.

Action for specific performance of an alleged contract for sale of real estate. Judgment in damages for plaintiff.

Affirmed.

1. REAL PROPERTY—*Contract of Sale.* Where the owner of real prop-

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erty makes a specific offer to sell, through a real estate broker, which offer is accepted by a purchaser, the negotiations being evidenced by letters and telegrams between the owner and broker, the transaction constitutes such a contract as may be specifically enforced.

2. SPECIFIC PERFORMANCE—*Damages.* Where the owner fails to carry out a contract for the sale of real property, and at the time of the trial it was beyond his power to specifically perform, a judgment against him for damages was sustained.

Error to the District Court of Larimer County, Hon. George H. Bradfield, Judge.

Mr. PAUL W. LEE, Mr. GEORGE H. SHAW, for plaintiff in error.

Messrs. STOW, STOVER & MANTZ, for defendants in error.

MR. JUSTICE SCOTT delivered the opinion of the court.

THIS action was by the defendants in error to compel the specific performance of an alleged contract for the sale of real estate.

The defendants in error, plaintiffs below, lived in Larimer County, Colorado, and the plaintiff in error resided at Loup City, Nebraska. The land had been listed for sale by the defendant with Carl Anderson, a real estate agent at Fort Collins, Colorado.

The contract relied upon grew out of certain letters and telegrams exchanged between Anderson and defendant Carlsen. These were as follows:

"Fort Collins, Colo.
June 21, 1918.

C. C. Carlsen,
Loup City, Neb.

Have offer of seven thousand two hundred fifty dollars for farm you to pay nineteen eighteen water assessments and keep present cash rent can pay thirty-two hundred fifty dollars down balance on or before five years at six per cent optional payment wire answer immediately.

Carl Anderson."

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Telegram from Carlsen to Anderson:

"Loup City, Neb.
June 22, 1918.

Carl Anderson,
S 581, Ft. Collins, Colo.

Cannot accept offer made but for immediate closing will take thirty-five hundred down balance as indicated pay nineteen eighteen water assessment and retain all rent from the land this year deed would have to be subject to present lease and I really feel land is offered too cheap.

C. C. Carlsen."

Telegram from Anderson to Carlsen:

"Fort Collins, Colo.
June 24, 1918.

C. C. Carlsen,
Loup City, Neb.

Do not understand price made in telegram wire exact terms and price.

Carl Anderson."

Letter from Carlsen to Anderson:

"Loup City, Neb.
June 22, 1918.

Carl Anderson,
Ft. Collins, Colo.
Dear Sir:

Your telegram advising me that you have an offer of $7250 for my farm near Wellington is just received and I have wired you that I will sell it for $7500, $3500 down, balance in a mortgage to me for $4000, due on or before five years, at six per cent interest from date, I to pay the water assessment for 1918, and retain all rents for this year from the farm, and land to be sold subject to possession under the lease now outstanding.

As stated in my telegram I really feel that this is selling the farm for less than it is worth, but because it is a long way from me and I cannot look after it personally, will let it go for the amount stated, if sold right away. I would not want this deal to drag along and if you cannot close with

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your prospective purchaser immediately call it off, and the price will not be a cent less than we asked, to-wit, $8000.00, and I really think I shall feel better if you write me that you did not sell it than if you advise that the place has been sold.

Thanking you for your immediate advices concerning this, I am

Yours very truly,

C. C. Carlsen."

Letter from Carlsen to Anderson:

"Loup City, Neb.
June 24, 1918.

Carl Anderson,
Ft. Collins, Colo.
Dear Sir:

I have just received your telegram stating that you did not fully understand mine of Saturday, and I am writing you today that I will take $7500 for immediate closing, and my letter of the 22nd will be received about the time you will get this telegram.

As stated in my letter of that date, I am not at all anxious to sell the land, but because of the long distance it is off, will give you a chance to sell it to your buyer, if he wants it, and unless you can close this immediately, do not make the offer at all, as my price is and will be $8000, as before stated.

Yours very truly,

C. C. Carlsen."

Telegram from Carlsen to Anderson:

"Loup City, Neb.
June 24, 1918.

Carl Anderson,
S. 581, Ft. Collins, Colo.

My offer for immediate acceptance is seventy five hundred dollars thirty five hundred cash now mortgage for five years for balance at six per cent interest from date possession to be given under lease but rentals for nineteen eighteen reserved by me and I will pay the nineteen

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eighteen water taxes you will have letter tomorrow explaining this.

C. C. Carlsen."

Telegram from Carlsen to Anderson:

"Loup City, Neb.
June 26, 1918.

Carl Anderson,
Ft. Collins, Colo.

Call off all negotiations have sold land.

C. C. Carlsen."

Telegram from Anderson to Carlsen:

"Fort Collins, Colo.
June 26, 1918.

C. C. Carlsen,
Loup City, Neb.

Sold farm early yesterday morning. Sent contracts for your signature and deposited five hundred dollars earnest money to your credit. Too late now to stop deal as per your telegram. Send abstract deed and contract at once.

Carl Anderson."

It was beyond the power of Carlsen at the time of trial to specifically perform, and the court gave judgment in damages in the sum of $500, which judgment is now before us for review.

It is contended that Anderson the agent was simply an agent or broker to find a purchaser and had no authority to execute a written contract of sale binding the land owner, and the case of *W. T. Craft Realty Co. v. Livernash*, 27 Colo. App. 1, and many other authorities are cited to sustain this contention.

The doctrine of that case cannot be denied, but the facts of this case do not bring it within the rule. Anderson did not attempt to execute a contract purporting to bind Carlsen, the principal. The proposed sale was not upon the terms nor at all under the arrangement by which the property was listed with Anderson for sale. It was a contract growing out of a specific offer by a particular person and culminating in a definite proposition by Carlsen himself,

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made to such person through telegrams and letters to Anderson.

The written contract signed by the Hays, mailed by Anderson to Carlsen on the 25th day of June was in compliance with the terms of the contract proposed by Carlsen in all respects. Among other things, it was there recited:

"And the said party of the second part hereby agrees to pay to the said party of the first part as the purchase price of said land, subject to said excepted liens and encumbrances, the sum of Seventy-five Hundred and No/100 Dollars in the manner following, to-wit: Five Hundred and No/100 Dollars cash in hand paid the receipt whereof is hereby acknowledged, and the balance as follows: Three Thousand & No/100 Dollars when papers are accepted and the balance on or before five years from date, with interest payable upon the deferred payments at the rate of 6 per cent per annum from date until paid, payable annually."

This contract was dated and mailed to Carlsen on June 25th. On the afternoon of the following day the latter sent his telegram calling off the negotiations.

The record discloses that during that day he met and made a sale of the premises to another party, represented by an agent, also from Fort Collins, for practically the same consideration.

Carlsen testified that he would have completed the deal with plaintiffs except for the sale made on the 26th to the other party.

The offer by Carlsen was to sell to "your buyer," necessarily alluding to the offer referred to in Anderson's original telegram, and not to any other person. This is made plain from the letter of June 24th wherein Carlsen said "If he wants it, and unless you can close the deal immediately, do not make the offer at all, as my price is and will be $8000, as before stated."

It is urged that the Hays did not pay the $3500 in cash as proposed by Carlsen, but on the contrary deposited only $500. They were not required to deposit the $500 at the

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time it was done, and that deposit was but an evidence of good faith.

The rule of reason and custom necessarily enter into such agreements. The proposition by Carlsen provided for the execution of a mortgage to secure the deferred payments, and this could not occur until title vested in the Hays, or the execution and delivery of the written agreement signed and forwarded by them to Carlsen which provided for the payment of the full agreed cash sum upon his signing and acceptance.

Both custom and reason demanded that Carlsen should sign and return the agreement if it contained the proposed terms, before he was entitled to the cash sum and the proposed notes and mortgage.

The parties were dealing at long distance, which necessarily required the use of the mails. This required a reasonable time which the parties must have contemplated. The acceptance was within the period of one day and therefore within a reasonable time. Neither custom nor reason requires minute details in proposals and acceptance such as constitute the contract here considered. For instance, Carlsen's agreement to sell in this case implied that he could convey a proper title.

Common sense and common honesty demand the enforcement of the contract.

It is clear from Carlsen's testimony that he would have signed and abided by the agreement except for the intervening sale. There is no dispute but that the Hays signed and forwarded an acceptance of Carlsen's proposition in good faith the day after it was made and one day before Carlsen attempted to withdraw it. It therefore constituted such a contract as may be specially enforced.

Judgment affirmed.

MR. JUSTICE DENISON and MR. JUSTICE TELLER concur.

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No. 9774.

THE PEOPLE EX REL. RIORDAN v. HERSEY, ET AL.

Decided January 10, 1921. Rehearing denied March 7, 1921.

Original Proceeding.

Petition for mandamus. Demurrer of defendants to alternative writ of mandamus sustained and proceedings dismissed.

1. CIVIL SERVICE—*Application of State Law.* The state civil service amendment applies only to officers and employes of the state.

2. OFFICERS—*Jury Commissioner.* A jury commissioner is not a state officer. He is an officer of the court, exercising judicial functions.

Mr. HORACE N. HAWKINS, Mr. STEPHEN W. RYAN, for relator.

Mr. WILLIAM H. DICKSON, Mr. JOHN CAMPBELL, for respondents.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

THIS is an original proceeding in mandamus, by the People of the State, on the relation of Patrick R. Riordan, against the judges, respectively, of the district, county and juvenile courts of the City and County of Denver. The action involves the right to the office of Jury Commissioner for such City and County, and by the writ it is sought to direct the defendants to annul, set aside and cancel an order of January 6, 1920, whereby under the Jury Commissioner Act, (S. L. 1911, p. 479), they appointed one Frank W. Howbert to that office. The petition also prays that the defendants be likewise directed to enter an order reinstating the relator in office, he having been the incumbent at the time Howbert was appointed. A majority of the defendants have filed a general demurrer to the alternative writ.

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At the time Howbert was appointed the state civil service amendment to the constitution was in effect, and the relator, Riordan, claims the right to retain the office thereunder, while the defendants contend, among other things, that the office of Jury Commissioner is not within the provisions of the state civil service amendment, which is concerned with:

"Appointments and employments in and promotions to offices and places of trust and employment in the classified civil service of the state."

The court held, in *People ex rel. v. Higgins*, 67 Colo. 441, 184 Pac. 365, that the amendment applied only to officers and employees of the state, the word "state" being used in the sense of employer, or the entity for whom the service is performed, rather than as a territorial limitation. Unless, therefore, the Jury Commissioner is a state officer it necessarily follows that he is not subject to the provisions of the state civil service amendment and the laws enacted to put it into effect.

Moreover, the state civil service amendment expressly exempts from its operation, among others, "persons appointed to perform judicial functions." The Jury Commissioner is authorized to administer oaths, to summon before him prospective jurors, to examine them as to their qualifications, to pass upon their qualifications and return a list of selected jurors to the court. Every power over this subject, which up to the beginning of the trial has heretofore been exercised by the judges of courts of record, has by this act been delegated to the Jury Commissioner. Custom, law or precedent may have stamped these as ministerial functions in other jursdictions, but plainly in Colorado they have been regarded and treated in the past as, and for the purposes of this case must be held to be, "judicial functions," which fact, by the express provisions of the amendment, exempts this office and this officer therefrom.

One who is "an officer of the court," as distinguished from a "state officer" is not within the terms of the amendment. *People ex rel. Clifford v. Morley*, 67 Colo. 331, 184

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Pac. 386. The act itself having designated the Jury Commissioner as an officer of the courts of the county, he is, under this holding, expressly excluded from the operation of the amendment.

State officers are those whose duties concern the state at large, or the general public, although they may be exercised within defined limits. 36 Cyc. 852. Plainly, unless the Jury Commissioner is a state officer he is not subject, under our own decision, to the state civil service amendment. The Jury Commissioners Act expressly provides that such Commissioners "shall be officers of the several courts of record of their respective counties." Their duties, which are thus confined within local limits, do not "concern the whole state" any more than the duties of every other public officer of every grade concern the whole state. If Jury Commissioners are state officers, then every other public officer of whatever grade is also a state officer. Public officers usually belong to one of these three classes, state, county or municipal; but this classification does not include all officers. Thus it was held in the *Speakership Case*, 15 Colo. 520, 25 Pac. 707, 11 L. R. A. 241, that the Speaker of the House of Representatives is not a state officer. He certainly is not a county or municipal officer. It is not necessary to hold a Jury Commissioner to be a county officer if he is found not to be a state officer, or a state officer if he is found to be neither a county officer nor a municipal officer. This is precisely the situation in which this court evidently found a bailiff of the district court, for in *People v. Morley, supra*, we held that bailiffs are officers of the court, but not state officers. This decision seems not only applicable here, but absolutely decisive and controlling.

Practically all the decisions on the subject sustain the proposition that a Jury Commissioner is not a state officer. Several cases hold that he is a county officer. 15 C. J. note 36. Other cases regard him as being neither a state nor a county officer, but as belonging to a separate and distinct class, strictly an officer of the court. In *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243, it was expressly

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held that he is *not* a state officer, in the following language:

"The question here presented is, whether the jury commissioners * * * are officers of the state, or whether they are in fact, like jurors themselves, mere officers of the court, such as commissioners in chancery, and, in a general sense, attorneys. We think there can be no doubt that such commissioners belong to the latter class, and go to make up a part of the judicial machinery, such as commissioners in chancery, general and special receivers, and other similar officers. Jurors are themselves, in a certain sense, officers of the court; and this special commission, (Jury Commissioner) is only a legislative device intended to aid the court in selecting them."

The foregoing was approvingly quoted in *State v. Kendle*, 52 Ohio St. 346, 39 N. E. 947, where the court also said:

"They (the Jury Commissioners,) are appointed by the common pleas judges to assist in the administration of justice, as are master commissioners and court constables. They are but handmaids of the court in the selection of judicious and discreet persons to serve on such juries as are required in the trial of causes, and the presentment of indictments."

Concluding, as we do, that the Jury Commissioner is not a state officer, and that he is "an officer of the court," it necessarily follows from our holding in *People ex rel Clifford v. Morley, supra,* and in *People ex rel. v. Higgins, supra,* that he is not within the civil service laws of the state, unless both of these decisions be flatly overruled.

The demurrer of defendants to the alternative writ of mandamus is sustained, and the proceedings dismissed.

MR. JUSTICE SCOTT, MR. JUSTICE TELLER and MR. JUSTICE DENISON dissent.

MR. JUSTICE DENISON, dissenting.

The question is whether the office of jury commissioner is a state office. I think this is settled by the case of *People v. Higgins*, 67 Colo. 441, 184 Pac. 365, following *People v.*

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Curley, 5 Colo. 412, 421, where it is said that if the duties of an officer concern the whole state he is a state officer even though elected or appointed for the city and though his powers are confined to local limits and however he is appointed and however paid; and that the administration of justice, the preservation of the public peace and the protection of the rights of the citizen, although confined to local agencies, are essentially matters of public concern.

The jury commissioner is engaged in the administration of justice and in the protection of the rights of the citizen as much as the water commissioner in *People v. Higgins*, the police magistrate or justice of the peace in *People v. Curley* or the division engineer in *People v. Chew*, 67 Colo. 394, 187 Pac. 513. He is therefore a state officer.

This conclusion is fortified by the fact that the civil service amendment, in defining the classified service expressly excepts from the category "classified civil service of the state" offices in substantially the same relation to the state as the office now in question, e. g., clerks of courts and stenographers. If these were not offices in the civil service of the State there could be no occasion for exception.

The next point is that the commissioner is a "person appointed to perform judicial functions," and so is excepted from the classified service.

The statute expressly provides that commissioners "shall be officers of the several courts of record of their respective counties." (S. L. 1911, 480.) This, however, does not give him judicial functions, nor does it bring him within any of the exceptions expressed in the act; on the contrary, since some officers of the courts are expressly excepted from the classified service by the act, the conclusion is inevitable that court officers as such are not excepted.

Has he any judicial function? His powers are:

1. To administer oaths.

2. To keep a record of his proceedings.

3. To prepare a list of persons in his county qualified by law to serve as petit jurors.

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4. To question by mail all persons whom he thinks qualified for jury duty.

5. To summon them for examination.

6. To examine them under oath as to the qualifications of themselves or others.

7. To prepare slips with name and address of every man on the list and put them in a box.

8. To attend at the drawing of the names from the box.

The only functions here mentioned which resemble judicial functions are the fifth and sixth. The third is a ministerial function (*In re Virginia*, 100 U. S. 348, 25 L. Ed. 676; *Hamma v. People*, 42 Colo. 401, 94 Pac. 326, 15 L. R. A. [N. S.] 621, 15 Ann. Cas. 655) formerly performed by the county commissioners and is the real and substantial duty of the office of jury commissioner to which all the others are ancillary or incidental; the first, second, fourth and seventh are ordinary clerical duties and under the eighth, the commissioner, with other officials, attends merely as a witness to insure fair play.

The fifth function is to issue summons to any person whom he believes qualified; but the issue of summons is not a judicial act. *Weil v. Geier*, 61 Wis. 414, 416, 21 N. W. 246. So of other writs: *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *Knowle's Case*, 8 Me. 71.

The serious question is whether the sixth, the power to hear witnesses under oath and determine from such evidence whether a name shall be put in the box, is a judicial power and the exercise of it a judicial function.

In most of the cases on this point, cited by respondents, the question was whether the power of appointment by judges was unconstitutional because not within the judicial but rather the administrative department of the state government. The courts held that it was germane to the judicial department, and so constitutional, that the appointment of the commissioner was a constitutional act, because he was selected to aid the courts in performing their judicial functions and the selection of such aids appertains to the judicial department. This is far from holding that the

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commissioner is a person appointed to perform judicial functions, although some things said in those cases go to that extent. There are cases holding that certain functions are not judicial and so may be conferred by statute on officers not judicial, as *DeCamp v. Archibald,* 50 O. St. 618, 625, 35 N. E. 1056, 40 Am. St. Rep. 692.

A judicial function is an act performed by virtue of judicial powers. Judicial power is power to adjudicate, *i. e.,* hear, consider and determine rights of parties and render a judgment, or some sort of a lawfully enforceable decision thereon. *People v. Simon,* 176 Ill. 165, 170, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175; *Durham v. Lewiston,* 4 Greenl. (Me.) 140, 143; *Sanders v. Cabaniss,* 43 Ala. 173, 181.

Judicial power, properly so-called, must include the power to hear and determine, but not every one who may hear and determine has judicial power. *People v. Colorado Title & Tr. Co.,* 65 Colo. 472, 178 Pac. 6; *People v. Simon,* 176 Ill. 170, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175; *State v. Le Clair,* 86 Me. 522, 528, 529, 30 Atl. 7; *State v. Hawkins,* 44 Ohio St. 98, 5 N. E. 228; *Cameron v. Parker,* 2 Okl. 277, 335, 38 Pac. 14.

The necessity of inquiry or determination of a fact before acting does not make the act a judicial one. *People v. Colo. Title & Tr. Co.,* 65 Colo. 472, 178 Pac. 6; *Merwin v. Boulder County,* 29 Colo. 169, 174, 175, 67 Pac. 285; *Sheely v. People,* 54 Colo. 136, 139, 129 Pac. 201; *Betts v. Dimon,* 3 Conn. 107, 109; *Grider v. Tally,* 77 Ala. 422, 425, 426, 54 Am. Rep. 65; *Crane v. Camp,* 12 Conn. 464; *Flournoy v. Jeffersonville,* 17 Ind. 169, 174, 79 Am. Dec. 468; *State v. Le Clair,* 86 Me. 522, 529, 30 Atl. 7.

The functions held not judicial include determination that a subordinate has been guilty of misconduct. *Cameron v. Parker,* 2 Okl. 277, 38 Pac. 14; that a pauper belongs in another state, *Knowles' Case,* 8 Greenl. (Me.) 71; that liquor is stored in a building, *State v. Le Clair,* 86 Me. 522, 30 Atl. 7; that police commissioners are guilty of misconduct in office, *State v. Hawkins,* 44 Ohio St. 98, 5 N. E.

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228; that an affidavit in replevin is sufficient, *Pennington v. Streight,* 54 Ind. 376; also power to designate where fire escapes shall be put on a building, *Arms v. Ayer,* 192 Ill. 612, 61 N. E. 851, 58 L. R. A. 277, 85 Am. St. Rep. 357; and to grant or withhold a theatrical license, *Armstrong v. Murphy,* 65 App. Div. 126, 72 N. Y. Supp. 475; the clerical work of a county judge acting as his own clerk, *Hamma v. People,* 42 Colo. 401, 408, 409, 94 Pac. 326, 15 L. R. A. (N. S.) 621, 15 Ann. Cas. 655, quoting with approval *In re Virginia,* 100 U. S. 339, 342, 25 L. Ed. 676. Selection of jurors has also, by the highest authority, been said to be not a judicial function. *In re Virginia,* 100 U. S. 339-342, 25 L. Ed. 676, and passing, by county commissioners, on claims against the county, *Merwin v. Boulder County,* 29 Colo. 169, 174, 175, 67 Pac. 285.

If it is not a judicial act for a county judge to make up a jury list, how can it be for a jury commissioner? If it is a ministerial act for county commissioners to hear evidence, and thereby determine a claim against the county, why is it not ministerial for a jury commissioner to hear evidence and determine whether a name shall go on the list?

The court still performs the judicial function of passing on the qualifications of the panel when drawn and of the jurors called for each case as it did when the county commissioners performed the duty now imposed on the jury commissioner.

These authorities force me to say that he does not perform judicial functions.

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No. 9864.

JONES v. THE PEOPLE.

Decided January 10, 1921. Rehearing denied February 7, 1921.

Plaintiff in error was convicted of statutory rape.

Affirmed.

1. CRIMINAL LAW—*Rape—Uncorroborated Testimony of Prosecutrix.* The fact alone, that a conviction of statutory rape rests upon the uncorroborated testimony of the prosecuting witness, is insufficient to require a reversal.

2. APPEAL AND ERROR—*Findings of Fact.* Findings of a jury on conflicting evidence will not be disturbed on review.

3. CRIMINAL LAW—*Proof of Venue.* Venue in a criminal case need not be proven by direct evidence.

Error to the District Court of Kit Carson County, Hon. Arthur Cornforth, Judge.

Mr. LOUIS VOGT, Mr. P. B. GODSMAN, for plaintiff in error.

Mr. VICTOR E. KEYES, Attorney General, Mr. CHARLES SHERRICK, Assistant, for the people.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error (hereinafter referred to as defendant), a married man of the age of 44 years, was tried in the lower court on an information of three counts, each of which charged a statutory rape on a twelve year old girl. He was convicted on each count and sentenced. From that judgment he brings error.

It is said that a new trial must be ordered for two reasons, First, because the verdict is not supported by the evidence; Second, because the venue was not proven.

If, as defendant insists, this conviction rested on the uncorroborated testimony of the prosecuting witness, that

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fact alone would be insufficient to require a reversal. *McQueary v. People,* 48 Colo. 214, 219, 110 Pac. 210; *Dickens v. People,* 60 Colo. 141, 146, 152 Pac. 909. This record however discloses considerable corroboration. Not, it is true, by direct evidence, (rarely obtainable in such cases) but by proof of surrounding facts, circumstances and conditions, which point to defendant's guilt, and which should, and doubtless did, have a controlling influence with the jurors. The evidence of the prosecuting witness was detailed and definite. It was unshaken save in a minor particular. It is corroborated as above indicated. It is flatly contradicted by defendant and some of his witnesses. Under such circumstances the fact was for the jury and its finding will not be disturbed. *Hallack et al. v. Stockdale et al.,* 14 Colo. 198, 200, 23 Pac. 340.

The prosecuting witness testified that each of these offenses was committed in a certain jewelry store, and counsel for defendant contends that this store was not shown to be located in the County of Kit Carson where the trial was had. Venue need not be proven by direct evidence. *Brock v. People,* 67 Colo. 389, 176 Pac. 744. If the rule were otherwise the proof is sufficient. This witness testified that she lived in the town of Stratton in Kit Carson County. "Q.—And where is this jewelry store relative to the main business street of Stratton, is it on the main street or on some side street?" "A.—It is on the main street."

Finding no reversible error in this record the judgment is affirmed.

MR. JUSTICE SCOTT not participating.

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No. 9865.

TRUE v. TRUE.

Decided Jan. 10, 1921. Motion to vacate order dismissing writ of error denied March 7, 1921.

Proceeding involving the payment of temporary alimony.

Writ of Error Dismissed.

1. DIVORCE AND ALIMONY—*Payment—Presumption.* The appellate court will presume that an order of the trial court for the payment of costs and attorney fees will be obeyed after the denial of a supersedeas.

2. APPEAL AND ERROR—*Moot Questions.* It is not the duty of the appellate court to give opinions upon moot questions or to declare rules of law which cannot affect the rights of the parties litigant.

Error to the District Court of Pueblo County, Hon. James A. Park, Judge.

Mr. C. S. ESSEX, Mr. JOHN B. BARNARD, for plaintiff in error.

Mr. W. O. PETERSON, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error brought suit for divorce against the plaintiff in error upon the ground of cruelty. In apt time she applied for temporary alimony, counsel fees and court costs. Upon a hearing upon the application, the court directed the defendant to pay $100 court costs and $200 attorney fees, payable May 10, 1920. An application for supersedeas was duly filed by plaintiff in error, and on July 30, 1920, the same was denied.

It must be presumed that plaintiff in error obeyed the order of the court after the supersedeas had been denied.

The judgment having been executed, the questions presented for our determination are no longer of any practical importance. It is not the duty of the court to give opin-

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ions upon moot questions, or to declare rules of law which cannot affect the rights of the parties litigant. *Floyd v. Cochran*, 24 Colo. 489, 52 Pac. 676.

The writ of error will, therefore, be dismissed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BURKE concur.

No. 9879.

WALKER v. BLAKESLEY.

Decided Jan. 10, 1921.

Action for money loaned. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

1. APPEAL AND ERROR—*Sufficiency of Evidence.* Where the evidence is sufficient to justify the submission of the case to the jury and to sustain a verdict for plaintiff, the judgment will not be disturbed on review.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. L. J. STARK, for plaintiff in error.

Messrs. GARWOOD & GARWOOD, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error sued plaintiff in error in the County Court to recover for money loaned the defendant, and a verdict was returned for the plaintiff. A new trial having been granted because of a mistake in the computation of interest, plaintiff again prevailed and had judgment. Defendant having taken the cause to the district court on

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appeal, plaintiff again had judgment. This cause is now here on error.

The only error urged is that the trial court denied defendant's motion for an instructed verdict in his favor.

The plaintiff testified that he loaned the money to the defendant by a check drawn to his order, and in accordance with an agreement to make the loan. The check was endorsed by and paid to the Walker Manufacturing Company, a corporation controlled by defendant and his family. Plaintiff's testimony is corroborated by one Southard who testified, also, that he turned the check over to defendant, who was interested with the witness in the transaction for which the loan was obtained.

There was abundant evidence to justify the submission of the case to the jury, and to sustain the verdict for plaintiff.

The judgment is accordingly affirmed.

MR. CHIEF JUSTICE GARRIGUES and MR. JUSTICE BURKE concur.

No. 9916.

FERGUSON v. TURNER.

Decided January 10, 1921.

Action for conversion of money by real estate broker. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

1. ACTIONS—*Conversion—Tort.* An action for conversion lies where there has been an appropriation by an agent of the proceeds of a sale.

An action for conversion is an action in tort.

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2. JUDGMENT—*Body Execution.* Where an agent appropriated money belonging to his principal, an action for conversion was held to be clearly one founded on tort within the meaning of section 3024 R. S. 1908, authorizing a body execution.

Error to the County Court of the City and County of Denver, Hon. Adair J. Hotchkiss, Judge.

Mr. E. L. CLOVER, Mr. J. Q. DIER, for plaintiff in error.

Mr. F. T. JOHNSON, Mr. S. H. JOHNSON, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action which was originally instituted in a Justice Court, and there are, therefore, no pleadings. The summons issued in the Justice Court recites that the complaint of the plaintiff is "in an action in tort based on fraud and wilful deceit and plaintiff asks that body execution issue, for failure to pay him a certain demand, not exceeding three hundred dollars."

A trial in the Justice Court resulted in a judgment for plaintiff. An appeal was taken by defendant to the County Court. The case was there tried to a jury, which assessed plaintiff's damages at $250, and in their verdict further stated as follows:

"We, the jury further find that in committing the tort complained of the defendant was guilty of actual fraud and wilful deceit."

The County Court entered judgment for plaintiff. The judgment was for $250 and costs, and authorized a body execution.

The defendant has sued out a writ of error, and the cause is before us upon his application for a supersedeas.

It is contended by the plaintiff in error, defendant below, that "no tort was proven" and that the verdict was therefore contrary to the evidence.

There was testimony from which the jury could have found the facts as follows: The plaintiff listed a tract of land for sale with the defendant, a real estate broker. The

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selling price of the land was to be $2500, and the agent's commission was to be five per cent of such amount. The defendant afterwards found a purchaser, and represented to the plaintiff that he "could only get $2250" the plaintiff agreed to have the land sold for $2250 instead of $2500, and the defendant agreed to limit his compensation as agent to $100. The land was then sold, and plaintiff believed it was sold for $2250. The plaintiff later learned from the purchaser that the latter had paid $2500 for the land. The testimony on behalf of the plaintiff is further to the effect that after the sale the defendant represented to the plaintiff that only $2250 was received from the purchaser, and that the defendant accounted to the plaintiff for only $2250, and concealed from him the fact that he had received $2500 from the purchaser. This testimony shows that the defendant converted to his own use the sum of $250 belonging to plaintiff, this sum being the difference between $2500 and $2250. Conversion of money is a tort. 38 Cyc. 499. The contention that the verdict is not supported by the evidence is not well founded. The evidence is sufficient to support a finding that a tort was committed, and also that the defendant was guilty of actual fraud and wilful deceit.

The principal contention of the plaintiff in error is that it was error for the court to authorize a body execution. To support this contention, the plaintiff argues that the only case, if any, made out by the evidence was one in assumpsit, for money had and received. There is no doubt that the plaintiff could have elected to sue in assumpsit, but the record shows that the plaintiff elected to sue in tort for conversion of the money.

The plaintiff had the right to elect, as he did, to sue in tort. Where an agent is guilty of tortious conduct in regard to the performance of the duties which he has undertaken, the principal may ordinarily sue the agent either in contract or in tort. 1 C. J. 1023, sec. 147, and cases cited.

An action for conversion was a proper remedy in the instant case. An action in conversion lies where there has

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been an appropriation by an agent of the proceeds of a sale. *Rauh v. Stevens*, 21 Ind. App. 650, 52 N. E. 997. Where an agent converts money of the principal to his own use, the principal may maintain an action of trover and conversion against him. 2 C. J. 887, sec. 578. In *Hogue v. Wells*, 180 Mich. 19, 146 N. W. 369, it was held that where an agent to whom a note had been delivered by his principal for collection collected a part of the note and failed to pay over the proceeds, the principal could maintain trover.

An action for conversion is an action in tort. 1 C. J. 1019. Conversion is a tort. 38 Cyc. 499. The basis of the plaintiff's right to recover damages was the defendant's alleged conversion of $250 of the purchase money received by the defendant from plaintiff's grantee. The action is clearly one "founded upon tort," within the meaning of section 3024 R. S. 1908. We cannot, therefore, sustain the contention of defendant to the contrary.

We find no error in the record. The application for a supersedeas is denied, and the judgment is affirmed.

MR. JUSTICE SCOTT, sitting for MR. CHIEF JUSTICE GARRIGUES, and MR. JUSTICE BAILEY concur.

No. 9926.

WEAVER v. INDUSTRIAL COMMISSION, ET AL.

Decided Jan. 10, 1921.

Proceeding under the Workmen's Compensation Act. Claim denied.

Reversed.

1. WORKMEN'S COMPENSATION—*Industrial Commission—Findings.* It is the plain duty of the commission to make specific findings reciting all facts important in the history of the case, as well as specific findings of fact bearing upon the contentions of the par-

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ties from the testimony adduced. Mere conclusions of law will not suffice.

2. *Industrial Commission—Findings—Evidence.* Where the findings of fact of the commission and the evidence contained in the record are insufficient upon which to determine the issue presented, the cause will be remanded to the commission for further investigation.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Messrs. QUAINTANCE, KING & QUAINTANCE, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. JOHN S. FINE, assistant, Mr. WILLIAM E. HUTTON, Mr. BRUCE B. MCCAY, for defendants in error.

MR. JUSTICE SCOTT delivered the opinion of the court.

THIS case, like a great majority of those having their origin with the State Industrial Commission contains no intelligent or sufficient statement or finding of fact by that body as is required by law.

The purported findings are confined entirely to the following:

"The Industrial Commission, on the 12th day of October, A. D. 1917, after having read and considered all of the evidence finds:

That the said A. C. Weaver on or about the 24th day of November, A. D. 1915, while performing duties arising out of and in the course of his employment as an employe of the said Mountain Motor Fuel Company by being burned on different parts of the body through an explosion.

The Commission further finds from the evidence that the said A. C. Weaver died on March 23rd, 1917, and that the proximate cause of the death of the said A. C. Weaver was due to abscesses or ruptured appendix and the ensuing appendicitis which was caused thereby, and that the death of the said A. C. Weaver was not caused by or due to the accident which the said A. C. Weaver suffered on the 24th

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day of November, A. D. 1915, and that therefore the claim of the said claimants, Louise Weaver, widow of the decedent, and Lena Louise Weaver, minor child of decedent, should be denied."

In this statement there does not appear to be the finding of a single fact which in any sense justifies the conclusion of the Commission, or which affords a basis for review by this court.

Just how the trial court could intelligently render a judgment for or against the contentions of either party from a consideration of this purported finding is not clear. The court sustained the judgment of the Commission, but certainly not from any statement of the facts detailed in the findings of the Commission, for this contains nothing but bare conclusions of law, certainly not justified by any fact stated therein.

The statute in this particular is not to be treated as without a purpose, and inasmuch as it prohibits the court from disturbing the findings of fact by the Commission upon which it bases its judgment and award, it is imperative that the court have before it a sufficiently complete statement of the facts by the Commission, as will enable it to render an independent conclusion as to the law to be applied.

It was not the purpose of the statute to compel the court to dig through the record to ascertain all of the facts appearing, else it would not have provided that the findings of fact by the Commission must be controlling on review.

A statement of the facts and circumstances of the entire case as found by the Commission is imperative, or an intelligent, efficient or just review by the court is impossible.

From the record alone, but not from any finding of fact by the Commission, we gather that A. C. Weaver, while in the employ of The Mountain Motor Fuel Company, was injured in an accident growing out of an explosion and fire, on the 24th day of November, 1915; that his injuries were extremely serious, his hair was burned from his head, his clothing burned from his body, his face permanently disfigured and his body permanently impaired. While it

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appears that at a later time he performed some sort of service for his company, it is quite clear that he was a sufferer by reason of his injuries in the accident until the time of his death.

The record indicates that Weaver had been awarded compensation, which he received for the period from the time of his injury until the time of his death, but this is not clear from the record and is not referred to in the findings of the Commission.

It appears from the record alone that he was operated upon for what was diagnosed as appendicitis and ulcers formed in the stomach and intestines and that he died a few days after such operation, on the 23rd day of March, 1917, or about one year and four months after the accident. He appears to have suffered greatly after the accident from nausea and from pains in the region of his stomach and bowels. This seems to have continued generally from the time of the accident until the time of the operation.

The surgeons suggested a deplorable internal condition appearing at the time of the operation. The testimony of the physicians indicates that the burns suffered were not the probable cause of appendicitis, yet it is not at all clear from the testimony that appendicitis was the direct cause of death or that this may not have been more directly attributable to other infections indicated by the ulcers and decaying condition found in the stomach and bowels.

The claim of the dependents is that there was such causal connection between the accident and the condition resulting directly in death as to justify recovery under the statute. The testimony of the physicians was not directed to this vital question sufficiently for the court upon its own initiative to determine the question and the Commission made no finding upon this point.

It is the plain duty of the Commission to make specific findings, reciting all facts important in the history of the case, as well as specific findings of fact bearing upon the contentions of the parties from the testimony adduced. Mere conclusions of law will not suffice.

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The judgment of the District Court is reversed with directions to remand the case to the Industrial Commission with instruction to investigate further as to the direct cause of the death of Weaver, and as to whether or not there was a reasonable causal connection between the accident and such cause of death, or whether or not such accident hastened death from any cause then existing. Further, that the Commission be required to specifically find its conclusion as to all the facts appearing, and its conclusions of law drawn from such facts.

Judgment reversed.

MR. JUSTICE DENISON and MR. JUSTICE BURKE concur.

No. 9928.

THE SIGEL-CAMPION LIVE STOCK COMMISSION CO. v. DAVIS.

Decided January 10, 1921. Rehearing denied March 7, 1921.

Action on agreement to accept draft given in payment for cattle. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

1. PLEADING—*Variance.* A complaint stated a cause of action upon an agreement to accept drafts, and also contained allegations concerning, a sale of cattle to defendant. Judgment was rendered for plaintiff on the cause of action based on the agreement, the court finding there was no sale to defendant. *Held*, that as the complaint stated a cause of action upon the agreement to accept, the allegations concerning cattle sold, could be taken as an inducement to the agreement to accept, or as surplusage, and that a claim on the part of the defense that there was a variance was not valid.

2. CONTRACT—*Agreement to accept draft.* At plaintiff's request, a bank telegraphed defendant, "Are you honoring Jack Goldberg's checks for cattle?" Defendant replied, "Yes, when cattle con-

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signed to us." Plaintiff then delivered his cattle, which were consigned to defendant, Goldberg giving him a draft on defendant for the amount due. Held, that the transaction constituted a valid contract on the part of defendant to honor the draft when presented; Also, that the bank in making the inqury was plaintiff's agent, and he an undisclosed principal who could take the benefit of the contract.

3. PLEADING—*Parties—Waiver.* Objection to a complaint, on the ground of non-joinder or parties, is waived by answer.

4. BILLS AND NOTES—*Acceptance.* A general agreement on the part of a drawee to accept bills, is valid. It is not necessary that the agreement refer to a particular bill.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. L. F. TWITCHELL, Mr. J. H. BURKHARDT, for plaintiff in error.

Messrs. HUGHES & DORSEY, Mr. WALTER M. CAMPBELL, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

DAVIS brought suit against the plaintiff in error and recovered judgment for upwards of $1500, upon an acceptance or contract to accept drafts drawn by one Jack Goldberg in payment for cattle shipped from New Mexico, consigned to the defendant at the Union Stockyards, Denver. The case is here on error. The plaintiff in error moves for supersedeas. The essential details of fact are as follows:

About September 18th, 1918, at Clayton, N. M., Goldberg and plaintiff met and talked of sale of cattle by plaintiff to Goldberg. They then went to the Wilcox ranch, about 30 miles, and inspected and arranged for sale to Goldberg of certain cattle. Goldberg gave plaintiff a draft on defendant for $200 to bind the bargain. The cattle were then driven to Clayton. Saturday, September 21st, at plaintiff's request and for him, the State Bank of Commerce of Clay-

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ton telegraphed defendant "Are you honoring Jack Goldberg's checks for cattle?" and received reply "Yes, when cattle consigned to us." These telegrams were communicated to plaintiff.

On Sunday, the 22nd, plaintiff signed and delivered to Goldberg a bill of sale for the cattle and Goldberg gave to plaintiff a draft on defendant in favor of Bank of Commerce, Taiban, N. M., which held a mortgage on the cattle, for $4982.50, the balance of their price. The cattle were then loaded on cars and consigned to defendant company, and defendant was notified by telegraph of what had been done. Goldberg accompanied the cattle to Denver and at Trinidad or thereabouts telegraphed defendant not to pay the drafts. The defendant refused to pay the drafts and refused to accept the cattle and they were sold at the stockyards for account of plaintiff for $3600. The Taiban bank before suit assigned the larger draft and all its claims thereunder to plaintiff.

The complaint contained two counts, the first count upon the acceptance or agreement to accept the drafts, and the second upon an alleged sale of the cattle to the defendant and refusal to accept.

The $3600 was credited by the plaintiff on his claim.

The court found for the defendants on the second count and for the plaintiff on the first count.

The first objection argued is that the first count is for goods sold, that there was no proof of a sale to the defendant and the court has so found, that therefore there was a variance and the defendant was entitled to a judgment as of nonsuit.

We do not think that the first count states a cause of action for goods sold, but that it states one upon an agreement to accept drafts. What appears to be an attempt to state a case for goods sold is but inducement to the cause of action upon the agreement to accept. Even if the count did state facts sufficient to constitute a cause of action for goods sold it still stated facts sufficient to constitute a cause of action upon an agreement to accept, and the part

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concerning the goods sold may be taken either as inducement to the agreement to accept or as surplusage, and therefore the claim of variance is not valid.

In the case of *Harkison v. Harkison*, 41 C. C. A. 201, 101 Fed. 71, the complaint stated facts sufficient to constitute a cause of action in assumpsit by way of inducement to an action for fraud and deceit, and the trial court was momentarily misled thereby so that it committed an error which reversed the case, although the complaint was sustained as an action for deceit by the Circuit Court of Appeals.

It is claimed that the telegram from the Bank of Commerce was a mere request for information, but we think with the court below that such information must be supposed to have been requested for some purpose and with intent that some one should act thereon, and that Davis had a right to rely and act upon the information so obtained. We think too that the defendant's reply amounted to an offer to honor a bill drawn according to its terms, and that the consignment of the cattle to defendant and the drawing of the bill by Goldberg and its receipt by the plaintiff constituted an acceptance of that offer and completed a valid contract on the part of the defendant to honor the draft when presented.

The Commission Company must have meant that they would honor Goldberg's draft for cattle, if the cattle were consigned to them. Business men do not telegraph around the country idly asking and giving information about their respective methods and practices in business, and do not ask and answer as shown in this case unless for a purpose in relation to a matter in hand.

The question of estoppel is discussed, but, in view of what is said above, it is unnecessary to consider it.

It seems to be claimed that because the agreement to accept was made with the Clayton Bank and not with the plaintiff, the plaintiff cannot take advantage of it. But it is shown that the action of that bank was at the request and for the benefit of the plaintiff. The bank then was his agent and he an undisclosed principal, and as such he could

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take the benefit of the offer and of the contract. 2 C. J. 873-877; *Ford v. Williams,* 21 How. 287, 16 L. Ed. 36; *Salmon Falls M. Co. v. Goddard,* 14 How. 446, 14 L. Ed. 446; *N. J. &c. Co. v. Merchants Bank,* 6 How. 344, 12 L. Ed. 465; *Culver v. Bigelow,* 43 Vt. 249; *Buffington v. McNally,* 192 Mass. 198, 202, 78 N. E. 309; *Barker v. Garvey,* 83 Ill. 184.

It is urged that Goldberg was an indispensable party. Suits have been maintained by payees against acceptors without joining the drawer for about 500 years; the drawer, therefore, can scarcely be said to be an indispensable party. Nor do we think he can be said to be a necessary party, under the code; but, if he could, the point has been waived by answer, as we have decided so many times that it is unnecessary to cite cases.

It is claimed that the agreement to accept must be to accept a particular bill which must be accurately described, even if not in existence at the time of the promise; but we find the authorities sustain general agreements to accept bills. See *Leach v. Hill,* 106 Iowa 171, 76 N. W. 667; *Hall v. First National Bank,* 133 Ill. 234, 24 N. E. 546.

It is not necessary to hold that the telegrams constituted a general letter of credit, because, as we have seen, Davis, the plaintiff, was the principal in the transaction, and not merely one to whom a letter of credit was shown.

We do not think it necessary to notice the other points made in the briefs.

The supersedeas should be denied and judgment affirmed.

MR. JUSTICE BURKE and MR. JUSTICE SCOTT concur.

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No. 9937.

SOUTHARD, ET AL. v. THE PEOPLE.

Decided January 10, 1921.

Action against principal and surety on a bail bond. Demurrer to defense sustained.

Reversed.

1. PLEADINGS—*Demurrer to Answer—Material Allegations to Be Taken as True.* In an action for the forfeiture of a bond in a criminal case, all the material allegations of the defense are, for the purposes of a demurrer to be taken as true.

2. BONDS—*Criminal Recognizance—Forfeiture.* When in a criminal cause, the district attorney agreed that he would consent to or move for a continuance when the case was called for hearing on the day fixed for trial, and the defendant in good faith relied upon such agreement and assuming that the matter would be continued, did not appear, it would be inequitable to forfeit his bond.

Error to the District Court of the City and County of Denver, Hon. Henry J. Hersey, Judge.

Mr. W. E. CLARK, Mr. JOHN T. BOTTOM, for plaintiffs in error.

Mr. WM. E. FOLEY, District Attorney, Mr. T. E. MCINTYRE, Assistant, for the people.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action against the principal and surety upon a bail bond. The condition of the bond was that the principal, a defendant in a criminal case, be and appear "at the District Court * * * on the 29th day of February, 1920, and from day to day and term to term thereafter, and remain at and abide the order of said court, and not depart the court without leave, then and there to answer unto a certain information," etc.

The *scire facias* alleges, among other things, that the

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cause was from time to time continued, "and eventually continued to the third day of May, 1920," and that on that date "the defendant appeared not but wholly made default."

In the amended answer to the *scire facias*, it is alleged, as one of the defenses, that:

"* * * prior to the said third day of May it was formally agreed between the District Attorney through one of his duly accredited deputies and the attorney for the defendant Dan B. Southard that the said case against the said Southard when it should be called on the said 3rd day of May, 1920, would be continued to a later date, and shortly after the incoming of Court on said date last aforesaid, the District Attorney * * * did formally move for the continuance and had said case continued to a later date certain, pursuant to the agreement which had theretofore been made for such continuance.

"That * * * after the District Attorney * * * agreed that the case would be continued as aforesaid, the said defendant was advised by his attorney that it was not necessary for him to be present on the said third day of May, 1920.

"That * * * the said defendant * * * did rely upon said agreement * * *."

To the amended answer, and to the above mentioned defense, the People interposed a demurrer, which was sustained. Error is assigned to the trial court's sustaining this demurrer.

Judgment was entered against the principal and surety, and they bring the case here on error.

All the material allegations of the defense are, for the purposes of the demurrer, to be taken as true. *Tanquary v. The People*, 25 Colo. App. 531, 535, 139 Pac. 1118; *Smith et al. v. People*, 67 Colo. 452, 184 Pac. 372, 7 A. L. R. 392.

The Tanquary case is cited in support of the text in 6 C. J. 1033, where it is said:

"In so far as bail have a legal right to rely upon the acts or declarations of the prosecuting attorney in the premises,

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and they are induced thereby to so act that their rights would be otherwise materially prejudiced under their bond or recognizance, they are not liable to forfeiture of bail."

In *People v. Morstadt*, 101 Cal. 379, 35 Pac. 1007, it was held that a continuance before the hour for appearance excuses appearance at such hour. In the Smith case, above cited, this court said:

"It is plain that the purpose of a recognizance is merely to insure the presence for trial of a person accused of a bailable offense. The enriching of the public treasury is no part of the object at which the proceeding is aimed."

Continuances may be, and generally are, granted by the court where both parties agree thereto. The bail in the instant case had the right to assume that the district attorney would carry out his agreement to move for or consent to a continuance, and had good cause to believe that the case would be continued. He relied on the agreement, apparently in good faith. Under the circumstances as made to appear in the pleadings, it would be inequitable to forfeit the bond.

We are of the opinion that the amended answer states a good defense and that it was error to sustain a demurrer thereto. The judgment is reversed, and the cause remanded for further proceedings consistent with the views herein expressed.

MR. JUSTICE SCOTT, sitting for MR. CHIEF JUSTICE GARRIGUES, and MR. JUSTICE BAILEY concur.

No. 9952.

OLSON-HALL v. THE INDUSTRIAL COMMISSION OF COLORADO, ET AL.

Decided January 10, 1921. Rehearing denied February 7, 1921.

Proceeding under the workmen's compensation act. Cause remanded with directions.

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Remanded.

1. WORKMEN'S COMPENSATION—*Jurisdiction of Supreme Court.* Under the Workmen's Compensation act, the appellate court can review questions of law only. It cannot review or determine the facts.

2. INDUSTRIAL COMMISSION—*Findings of Fact.* In a proceeding under the workmen's compensation act, it is the duty of the industrial commission to make sufficient specific findings of fact, and where it fails to do so, a cause which has been brought to the supreme court for review will be remanded for further findings.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. W. H. GABBERT, Mr. D. B. GRAHAM, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. JOHN S. FINE, assistant, Messrs. DANA, BLOUNT & SILVERSTEIN, for defendants in error.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS cause is here on writ of error to review a judgment of the District Court confirming the findings and award of the Industrial Commission in the matter of a claim for compensation under the Workmen's Compensation Act.

The findings of the commission are, aside from formal matters, as follows:

"That the burden of proof is upon the claimant. That the claimant has not established her claim as required by law. That she has not shown that the said John Olson was injured by an accident at the date and place mentioned in her claim, or that his death, which occurred October 12th, A. D. 1918, was the proximate result of said accident. That, therefore, the claim of the said Augusta Olson for compensation herein should be denied."

The findings of fact in this case are insufficient as such are required to be found by the commission under the provisions of the Workmen's Compensation Act. Under that act this court can review questions of law only and we

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cannot review or determine the facts. Hence the necessity of the commission's making specific findings of fact before the cause is properly reviewable on questions of law in this court. We therefore remand this cause to the district court with directions to require the commission to make more specific findings of fact. Reference is hereby made to the opinion in the case of *Billick v. Industrial Commission*, (No. 9727) 195 Pac. 114.

No. 9957.

SPENCER, ET AL. v. BRUNDAGE.

Decided January 10, 1921.

Action to recover money paid on the purchase price of a rooming house. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

1. VENDOR AND VENDEE—*Purchase Money—Payment.* A broker acting for defendants, sold a rooming house to plaintiff receiving $1,000 to apply on the purchase price; of this amount he retained $750 as his commission, delivering the balance to defendants. *Held*, that in legal effect, defendants received from plaintiff $1,000 of her money as a part of the purchase price.

2. ACTIONS—*Money Had and Received.* An action for money had and received can always be maintained wherever one has received money which, in equity and good conscience, he ought to pay over.

Error to the District Court of the City and County of Denver, Hon. C. J. Morley, Judge.

Mr. H. E. LUTHE, for plaintiffs in error.

Messrs. RUSH & CLINE, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

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THIS is an action to recover the sum of $1000, alleged to have been paid by plaintiff to a real estate broker for the use and benefit of the defendants, and received by them, as a part of the purchase money for a rooming house. A trial was had to a jury, and at the close of all of the evidence the court directed a verdict for the plaintiff. Judgment on the verdict was entered. Defendants bring error, and the cause is before us upon their application for a supersedeas.

The direction of the verdict in favor of the plaintiff is assigned as error. Admitted or undisputed facts, relevant to the propriety of a directed verdict, appear in the record as follows:

The defendants were the owners of the furniture and business of a rooming house, known as the Luna Hotel, in the city of Denver. They informed one G. M. Walker, whom they describe in their testimony as a "curb broker" and "business chance man," that they would sell their rooming house if they could get "twelve thousand, net" to themselves. Walker then sought to interest the plaintiff in the purchase of the defendants' rooming house. Thereafter, and on February 21, 1920, Walker and the plaintiff signed an instrument in writing which, in part, reads as follows:

"Recd. of Clara E. Brundage $1,000 as a part payment on the furniture and furnishings in the rooms * * * known as the Luna Hotel, subject to the following conditions that the purchase price is to be $12,500.00 to be paid as follows: $7,000 is to be paid in cash on or before March 1, 1920, when a good and clear title is to be given to the said furniture and furnishings and possession of the premises in which the same are contained and also the lease that is now on the premises is to be transferred to the said Clara E. Brundage with the consent of the owner of said premises. * * *"

The plaintiff, Mrs. Brundage, at this time gave Walker a check for $1,000.

It appears that on the same day, Feb. 21, 1920, Walker

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informed the defendants that he had found a purchaser for them. In his testimony he says:

"I submitted Mrs. Brundage's offer to them and they said they would carry it through; they said there was no question about the transfer of the old lease."

Stella Spencer, one of the defendants, called as an adverse witness for cross-examination, gave the following testimony:

Q. How did you know what you were going to get for the place?

A. I had told Mr. Walker twelve thousand net.

Q. When you inventoried it you didn't know what you were going to get for your property?

A. Certainly, because by that time he (Walker) had got the deposit on it, and it was to be $12,500. * * *

Q. What did he tell you?

A. He told me how the payments were to be made.

The record shows that the defendants were willing to sell the rooming house upon the terms agreed upon in the writing between Walker and the plaintiff, so far as concerns amount and time of payments and the assignment of the lease. When asked if Walker said anything about the lease, the witness Spencer, one of the defendants, answered:

"We naturally supposed the lease was to be assigned."

Further testimony along this line by her is as follows:

Q. Did you know that in your lease you had an agreement that unless you got the written consent of the owner you couldn't assign it?

A. Certainly.

Q. And you were, of course, intending to get the written consent of the owner?

A. Yes, sir.

Walker informed the defendants that he had received a deposit of $1000 from the plaintiff to apply on the purchase price of $12,500. The defendants were satisfied with the terms of sale arranged by Walker, and they understood, and knew the fact to be, that the sale could not be com-

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pleted unless and until the owner of the building in which their rooming house was conducted should consent to an assignment of the lease.

The $1000 was received by the defendants as a part of the purchase money, and knowingly was it thus received. Counsel for defendants states in his brief that the defendants never received this money, but it is admitted in the record that Walker accounted to them for all of it. The defendants allowed Walker to retain out of the $1000 the sum of $750 as his commission for finding the purchaser, the plaintiff. He thereupon delivered to them the balance, $250. It can make no difference whether Walker delivered the $1000 to the defendants and then received back $750 thereof as his commission, or was permitted in the first instance to retain $750 and deliver the balance. In legal effect the defendants received from plaintiff $1000 of her money as a part of the purchase price.

It next appears that the defendants were unable to obtain the landlord's consent to an assignment of the lease, prior to March 1, 1920, and they were, therefore, unable to complete the sale of the rooming house to the plaintiff. The plaintiff on March 1, 1920 notified the defendants that she rescinded the contract, and demanded the return of the $1000. The defendants refused to refund the money, and this action was then brought. Other facts appearing in the record do not change the effect of those herein recited, and therefore need not be set forth.

Whatever may have been the theory upon which the trial court directed a verdict for the plaintiff, the direction was right upon principles which permit a plaintiff to maintain an action for money had and received. As said in *Zang Brewing Co. v. Bernheim*, 7 Colo. App. 528, 44 Pac. 380, "such actions can always be maintained wherever one has received money which, in equity and good conscience, he ought to pay over." A recovery of purchase money paid may be had upon various grounds, as stated in 39 Cyc. 2001, as follows:

"When the proposed contract was never entered into, or

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where the contract is one that is not enforceable, or has been rescinded by mutual consent, by the vendor, or by the purchaser under a right to do so, the purchaser may sue the vendor to recover the money which has been paid by the purchaser to the vendor."

The judgment is right, and is therefore affirmed.

MR. JUSTICE SCOTT, sitting for Mr. CHIEF JUSTICE GARRIGUES, and MR. JUSTICE BAILEY concur.

No. 9960.

THE INDUSTRIAL COMMISSION OF COLORADO, ET AL. v. THE COLORADO FUEL AND IRON COMPANY.

Decided January 10, 1921.

Proceeding under the workmen's compensation act. Judgment limiting compensation for non-resident dependents to $1000.

Affirmed.

1. WORKMEN'S COMPENSATION—*Non-resident Dependents.* Under sec. X, chap. 155, S. L. 1917, not to exceed $1,000 shall be paid to non-resident dependents in any case, regardless as to the number of them, times of payment, or whether under original or subsequent awards.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. VICTOR E. KEYES, Attorney General, Mr. JOHN S. FINE, Assistant, for plaintiffs in error.

Mr. FRED FARRAR, Mr. WENDELL STEPHENS, for defendant in error.

MR. JUSTICE SCOTT delivered the opinion of the court.

IN this case the Industrial Commission found that Sil-

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vano Hernandez, an employe of the Colorado Fuel and Iron Company, was killed by an accident arising out of and in the course of his employment, on the 2nd day of November, 1918; that at the time of his death he left his widow, Maria Hernandez, a daughter, Josephino Hernandez, and a son, Manuel Hernandez, both of which children were minors; that the widow and daughter, at the time of the death of the employe, resided in the Republic of Mexico, and the son resided in the city of Pueblo, Colorado. The Commission further found that the said widow and minor children were wholly dependent upon the deceased for support.

An award was made upon the basis of $2,500.00. The minor son who resided in Colorado was awarded one-third of this sum, or $833.33. The widow and daughter were awarded jointly one-third of the remainder, or one-third of $1,666.67, to wit, $555.56, under the limitation of the statute in case of foreign dependents.

The minor son died on January 8, 1919, with the sum of $807.88 of the award to him remaining unpaid. The widow remarried on the 2nd day of May, 1919, and the unpaid portion of the award to her lapsed under the statute.

The Commission then awarded to Josephino, the infant daughter residing in Mexico, the total of the lapsed and unpaid portions of the awards theretofore made to the widow and son in the total sum of $1,363.44, less certain expenses provided by the statute.

Appeal was had from this award to the District Court where judgment was rendered reducing the total amount of this award to the dependent, Josephino, to the sum of one thousand ($1,000) dollars, less the sum awarded in the first instance, as provided by the statute. Error and cross error are assigned.

The sections of the act of 1917 applicable are as follows:

"V. In case of remarriage of a spouse without children, he or she shall receive a lump sum settlement equal to one-half of the amount of compensation remaining unpaid. This amount shall be paid to such spouse within sixty days

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after written notice to the Commission of such remarriage. In case of remarriage of a spouse who has dependent children, the unpaid balance of compensation, which would otherwise become due to such spouse shall be paid to such children.

"VII. (1) Questions as to who constitute dependents and the extent of their dependency, shall be determined as of the day of the accident to the injured workman, and their right to death benefits shall become fixed as of said time irrespective of any subsequent change in conditions, and the death benefits shall be directly payable to the dependent or dependents entitled thereto, or to their legal representatives.

(2) When a right to death benefits shall have become fixed, it shall cease upon the happening of any one of the following contingencies:

(a.) Upon the marriage of the spouse, with the exception as to lump sum settlement, as hereinbefore provided.

(b.) When a child reaches the age of eighteen years, unless such child at such time is physically or mentally incapacitated from earning.

(c.) Upon the death of any dependent. *Provided, however,* that in any case where the share of any dependent shall lapse, it shall survive to the remaining dependents.

"X. Death benefits under this act to dependents who are non-residents of the United States shall be one-third of the amount which a dependent who is a resident of the United States might receive; *Provided,* that in no event shall death benefits to dependents who are non-residents of the United States exceed the aggregate sum of one thousand dollars."

It is clear that under Section VII of the act, upon the death of the son, the unpaid amount of the award to him should be paid *pro rata* to the widow and daughter, subject to the limitation provided by section X. And under section V, upon the marriage of the widow, being at a later date, the unpaid portion of the award to her, was required

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to be paid to the surviving daughter, subject to the same limitations.

Section X limits the sum to be paid to a non-resident of the United States to one-third of the amount to be paid to a resident dependent, and provides that "in no event shall death benefits to dependents who are non-residents of the United States exceed the aggregate sum of one thousand dollars." It is plain that by this language it was intended that not to exceed one thousand dollars was to be paid to non-resident dependents in any case, regardless as to the number of them or as to the times of payment, or whether under the original or subsequent awards.

It is contended by the Commission that this limitation applies only to the original award. This construction cannot be sustained.

It is contended by the defendant company that the amount must be limited to one-third of the unpaid sum, that is to say, one-third of the sum of $807.89 still due under the award to the son, or $269.30. This is equally erroneous.

The District Court held that in this case the one thousand dollar limitation only applied, and that the daughter, Josephino, residing in Mexico, was entitled to receive from the unpaid awards the sum of one thousand dollars less the sum of $555.55, being the amount theretofore awarded to the widow and daughter.

We think this is the only reasonable construction to be given to the statute considered in its entirety, and the judgment is accordingly affirmed.

MR. JUSTICE DENISON and MR. JUSTICE BURKE concur.

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No. 9971.

HUDSON v. MATTINGLEY.

Decided January 10, 1921.

Petition by father for custody of minor children. Denied.

Affirmed.

On Application for Supersedeas.

1. CHILDREN—*Residence—Jurisdiction of Juvenile Court.* Minor children are residents of the county in which their father resides, the father and mother not being separated; and the fact that at the time of the commencement of a proceeding involving their custody they were temporarily in another county with their mother, would not deprive the juvenile court of the county of the father's residence of jurisdiction.

2. APPEAL AND ERROR—*Waiver of Objection.* In a proceeding before a juvenile court for the custody of minor children, the objection that the petitioner was a resident of another county, does not go to the jurisdiction of the court.

3. JUVENILE COURT—*Power—Order on Conflicting Evidence Conclusive.* The power of a juvenile court in matters involving the custody of minor children, is great, and while it should be exerted with the utmost circumspection, an order based upon conflicting evidence will not be disturbed on review.

Error to the Juvenile Court of the City and County of Denver, Hon. Ben B. Lindsey, Judge.

Mr. H. G. SAUNDERS, for plaintiff in error.

No appearance for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

IN June, 1920, Mattingley petitioned the Denver Juvenile Court that Hudson be deprived of the custody of his two children, Lola, then aged two years and Elsie, three months. The court ordered the children into the custody of Mattingley and his wife, with leave to the father to

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merely visit them. Hudson, the father, brings error and asks for a supersedeas.

Three points for reversal appear: First, that because the children were in Jefferson county at the time of the petition, the Denver court had no jurisdiction; Second, That because the petitioner was a resident of Jefferson county, the court had no jurisdiction; Third, That the evidence was insufficient to justify the order.

As to the first point: It is difficult to determine from §§ 553, 554 and 555 of the Revised Statutes of 1908 what the territorial jurisdiction of the juvenile court is, but we do not find it necessary to decide that question. The children were temporarily with their mother at the house of the petitioner, their maternal grandfather, in Jefferson county, when their mother died and remained there till this proceeding was begun, but she had not separated from her husband and he still resided in Denver, therefore the children were residents of Denver. *Mills' Guardian, v. City of Hopkinsville,* 11 S. W. 776; *Prentiss v. Barton,* 19 Fed. cases, No. 11384; *Van Matre v. Sankey,* 148 Ill. 536, 556; 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; 19 Corp. Jur. 410. When therefore they were brought into this city for the trial, they were lawfully and rightfully there and before the court. Their presence in Jefferson county was a mere incident of their mother's visit to her parents. The subject-matter of the proceeding was the custody and control of the children. We think the court had jurisdiction thereof. What would be the effect of bringing children from the county of their residence to a county in which they did not reside, upon the question of jurisdiction is another matter and is not before us.

As to the second point: This objection was expressly waived at the trial, and the only claim now made is that because of the residence of the petitioner in Jefferson county the court had no jurisdiction of the subject matter and that such objection cannot be waived. We have seen, however, that the court had jurisdiction of the subject matter, and, moreover, this objection does not go to the

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jurisdiction. The case is analogous to one under the code where there are improper parties or the plaintiff has no legal capacity to sue. Such objection is waived by answer and has nothing to do with jurisdiction. Code 1908, §§ 56, 61, 79. *Thalheimer v. Crow*, 13 Colo. 400, 22 Pac. 779; *Hayden v. Patterson*, 39 Colo. 15, 88 Pac. 437; *El Paso County v. Colo. Spgs.*, 66 Colo. 111, 119, 180 Pac. 301, 305, and many other cases. See also *Whipple v. Wessels*, 66 Colo. 120, 127, 180 Pac. 309, 312; and *Christ v. Flannagan*, 23 Colo. 140, 46 Pac. 683. This objection, then, was waived.

As to the third point: We have carefully read all the evidence, and, if the court believed the evidence for the petitioners, we cannot say that the order was wrong. The power of the juvenile court in such cases is great, the responsibility is heavy. Such power should be exerted with the utmost circumspection and children should not be taken from their parents without strong reason, clearly proven, but, upon conflicting evidence, the lower court's order must stand.

Supersedeas denied. Judgment affirmed.

MR. JUSTICE BURKE and Mr. JUSTICE SCOTT concur.

No. 9523.

PEETE, AS ADMINISTRATOR, ET AL. v. RENSHAW, ET AL.

Decided February 7, 1921. Rehearing denied March 7, 1921.

Action to set aside report of receiver and share in proceeds of property. Petition denied.

Affirmed.

1. ACTIONS—*Receivership.* Plaintiff in an action in which a receiver is appointed to liquidate the whole property, cannot change his suit into one for mere judgment and execution and so avoid the receivership, while there are creditors in court.

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2. RECEIVERS—*Claims.* It is not the duty of a receiver to look after and prosecute claims of creditors against the receivership estate.

3. *Final Orders—Notice.* Final orders winding up a receivership are not invalid on account of lack of notice to non-resident claimants not represented by resident counsel.

4. *Petition to Set Aside Final Report—Delay.* After a delay of three years from the commencement of the suit and one year from the final report and discharge of the receiver, a petition of one who has not presented his claim to the court for final allowance, to set aside the receiver's report and discharge and to be allowed to present his claim and have a re-distribution of the trust estate, will not be granted.

Error to the District Court of Clear Creek County, Hon. H. S. Class, Judge.

Mr. EDWIN H. PARK, Mr. WILLIAM B. RODDA, for plaintiffs in error.

Mr. JOHN W. SLEEPER, Mr. E. M. SABIN, Mr. HUBERT L. SHATTUCK, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

PEETE, administrator of Matilda Chesbro, filed petition to set aside the report of Stimson, receiver, and be allowed to share in the proceeds of property which had been held by the receiver, on the ground that his intestate was a creditor who was entitled to share with others in those proceeds. The court below denied the petition. Comstock, trustee in bankruptcy of F. B. Chesbro, filed a similar petition with like result. They join as plaintiffs in error.

The Boston and Colorado Power and Water Company owned certain property and franchises in Clear Creek County and had certain water rights in Boulder County. It was heavily indebted to defendant in error, Renshaw, and others. May 31st, 1913, Renshaw brought suit in Clear Creek County District Court against said company on promissory notes and for moneys advanced, alleging that the notes were part of the purchase price of the Clear Creek

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County property, and also alleging other matters, including mismanagement, that the company's assets and franchises were in danger, and the necessity, in the interest of the creditors and others, for a receiver to wind up the corporation and praying for judgment for $78,091.96 with interest, for a receiver with power to wind up the company, to sell its property, and, after expenses, to pay the creditors who should file claims in court, ratably, and for general relief.

E. C. Stimson was appointed receiver "with full power and authority" *inter alia*, to wind up the company's affairs and dissolve the same, to continue the business, "to sell any and all property of said defendant company upon order of this court" and apply the proceeds first to expenses and then to the creditors "in proportion to their respective claims as the same shall be filed and approved in and by this court," then to the stockholders. "Said receiver shall have power and authority to pass upon all claims due from said defendant company and report the same to this court."

There was an answer denying the mismanagement, alleging fraud in the sale of the Clear Creek property by Renshaw to the Company and offering to rescind.

No order was made by the court to the receiver to sell the property, and he never did so.

October 6, 1914, Renshaw had judgment for $100,730.79 and execution awarded. In 1916 he obtained a special order for leave to issue execution, and July 13th of that year he levied an execution on the Clear Creek property and bought it in at execution sale, for $72,000. He satisfied all creditors except the Chesbros, and credited the remainder of his bid on his judgment. By direction of the court the sheriff gave the receiver $25,000 of the proceeds of the sale to cover the expenses of the receivership.

In the meantime the Chesbros had sent to the receiver statements of their claims, but they did not file them in court. *March 16, 1914*, the receiver wrote to F. B. Chesbro a letter in which he suggested that he consult an attorney, saying that he could not advise him how to proceed. *July 25th, 1914*, Wardner, attorney in Boston, for the Ches-

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bros, wrote to the receiver, enclosing the claim of Mrs. Chesbro, and asking the receiver to file it in its proper place, and he enclosed other papers for filing in other litigation. August 6, 1914, Wardner wrote the receiver acknowledging the receipt of a letter and saying: "You do not say whether you have filed" the claim "but I assume that you have." He also encloses F. B. Chesbro's claim, and asks the receiver to file it, and encloses other papers for filing in other matters. August 10, 1914, answering Wardner's of August 6, the receiver says he cannot advise Wardner in regard to the conduct of the case. He suggests sending papers directly to the clerk, but says that if they are sent to him he will "dispose of them as you may desire." The receiver notified the Chesbros, presumably by mail, that he would present their claims to the court at Georgetown on September 20, 1916, and ask for instructions in regard to them. He did not do so, but on September 23rd, 1916, at Littleton, without notice to the Chesbros, he presented his *final report* and was discharged. It nowhere appears that the Chesbros appeared in Georgetown on the 20th or made any attempt to do so or made any attempt to prove their claims or obtain a hearing on them. The order of discharge directed the receiver to transfer certain accounts and bills receivable held by him, which he had accumulated in operating the Clear Creek property, to Renshaw to be credited upon the judgment, which he did, and it also directed him to pay and he paid to Renshaw the balance of the $35,000 received from the sheriff, which remained in his hands after all expenses had been paid. This balance was $3,775.63 and the same was credited upon the judgment, a balance of which still remains unpaid. It does not appear that the Chesbro claims were ever presented to the court or allowed or disallowed or that the receiver "passed upon" them. The Chesbros were non-residents and had no attorney in this state.

September, 1917, a year after the receiver's discharge, plaintiffs in error filed their separate petitions, asking that the judgment for plaintiff and all orders subsequent to

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July 10, 1916, be annulled, that the receivership be reopened, a new receiver be appointed and that petitioners and other creditors who should come in have general relief. The petitions were heard upon affidavits and arguments, were denied and the present writ of error was thereupon brought.

At the trial upon which Renshaw recovered his judgment the defendant did not appear. It is now claimed that the notice to call the case for trial was insufficient. Counsel, however, have not assigned error upon this point, and on page 20 of their reply brief they apparently abandon the question, so we do not further notice it.

Counsel for the receiver in his brief claims that the issue of execution and the sale under it were proper and right, because, as he claims, the case was thereby rendered a mere suit for money judgment.

We think this is wrong. The complaint and the order of the appointment of a receiver show that a receivership to liquidate the whole property was intended and created. Renshaw could not change his suit into one for mere judgment and execution, and so avoid the receivership, while there were creditors in court, even with the receiver's consent. All creditors, therefore, who came in according to the terms of the order of the receiver's appointment were entitled to demand liquidation and distribution.

There is much dispute in argument as to whether the sending of the claims to the receiver was a compliance with the requirement of the order of appointment and whether the claimants were justified in assuming that their claims were properly filed. For the purposes of this decision, however, we shall treat the claims as properly filed in court, and we shall assume that, having so filed them, the claimants treated them as they did after filing them with the receiver. What then is the position of these claims in equity? Was it not their duty to take some action to present the claims? No one else had such a duty. It was not the receiver's duty to look after the claims for them. They made no move for three years. They never even employed

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an attorney or any one else in Colorado to look after the business. They seemed to have assumed that the receiver would look after it for them. When they were notified that the receiver would present the claims and ask for instruction they made no move. Then was the time for action if never before. They knew that any other creditor had a right to object to their claims and that when they were presented, if at no other time, such objection could be made; but they did nothing; they paid no attention to any other proceedings in the case, the execution orders, for instance. The final orders were not invalid on account of lack of notice to the claimant because they were non-residents without an attorney here, Code 1908, § 406. What right had they to neglect the prosecution of their claims for three years and for nearly a year after they had notice that they were to be presented and instructions asked in regard to them, and after the receiver was discharged?

The judgment should be affirmed.

No. 9646.

CITY OF MONTROSE v. PRICE.

Decided February 7, 1921. Rehearing denied April 4, 1921.

Action of city against defendant for the sale of intoxicating liquor. Judgment for defendant.

Reversed.

1. INTOXICATING LIQUORS—*Instructions.* In a prosecution by a municipality under an ordinance prohibiting the sale of intoxicating liquors, a sale being proven, it was error for the court to instruct the jury to the effect, that in order to find defendant guilty, it must appear that he had reason to believe that the liquor sold was to be used as a beverage for the purposes of intoxication, and not as a medicine.

2. *Medicinal Purposes—Good Faith.* One who sells intoxicants

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cannot defend his action on the ground of good faith, by claiming the sale was for medicinal purposes, when he had made no attempt to comply with the provisions of law permitting such sales.

3. EVIDENCE—*Sales by Other Persons.* Evidence of sales of liquor of the same kind by other persons, who were not prosecuted therefor, is inadmissible in a prosecution for the sale of intoxicating liquor.

4. WRIT OF ERROR—*Right of Municipality.* The fact that an act made an offense by municipal ordinance, is also punishable by general statute, does not preclude the city from having an adverse judgment reviewed by an appellate court.

Error to the County Court of Montrose County, Hon. S. S. Sherman, Judge.

Mr. HENRY W. CATLIN, for plaintiff in error.

Mr. CHARLES J. MOYNIHAN, Mr. W. H. GABBERT, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

THIS cause is before us on error to a judgment of the County Court of Montrose County in favor of defendant in error. The cause was originally begun in the Police Court of said city by a complaint, which charged that the defendant in error "then and there being, as an officer of The Busy Bee Drug and Candy Company, a corporation, did sell and keep for sale and offer for sale intoxicating liquors within the corporate limits of the City of Montrose, etc."

Upon a trial in Police Court, defendant was found guilty, and appealed to the County Court, where judgment was rendered in his favor, as above stated.

The prosecution was under an ordinance of the City of Montrose, which among other things, provided in Section 1 as follows:

"And no person, association or corporation shall, within this city, sell or keep for sale any intoxicating liquors or offer any intoxicating liquors for sale, barter or trade. Provided, however, that the handling of intoxicating liquors for medicinal or sacramental purposes may be done

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as now provided by the laws of the state of Colorado."

The ordinance further provided:

"Section 6. Any person, agent, employee, representative, manager, proprietor, pharmacist, physician, the member or members of any association, the officer or officers of any corporation, or any other person who shall violate any of the provisions of this ordinance within the limits of this City; and any person, association, corporation, whose officers, agent, employee, representative or servant shall violate any of the provisions of this ordinance, shall be deemed guilty of a misdemeanor and be fined not less than One Hundred Dollars ($100.00) nor more than Three Hundred Dollars ($300.00).

Section 7. The phrase, 'Intoxicating Liquor,' as used herein shall be construed liberally to include intoxicating liquors of every kind and character, which now are in use or which in the future may come into use as a beverage, no matter by what name they may be known or called, and no matter how small the percentage of alcohol they may contain, and no matter what other ingredients may be in them."

From the record it appears that the case was based upon the purchase on a Sunday of two bottles of "Beef, Iron and Wine," which the purchaser drank, and as a consequence thereof became drunk, and was lodged in jail. On the following day he bought a third bottle. These purchases were made from a clerk in the store of which the defendant in error was the manager, he being the vice president of the owning company. The evidence showed that the article contained 20% of alcohol, that it was in fact intoxicating, and that it was in use as a beverage.

Plaintiff in error contends that the court erred in instructing the jury to the effect that in order to find the defendant guilty they must find that he sold the article, or permitted it to be sold, from the store in which he was in charge "as a beverage for intoxicating purposes, knowing or believing or having reason to believe or suspect that it was to be used as a beverage for purposes of intoxica-

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tion, and not as a medicine, at the time and place charged in the complaint."

The question then is, must the prosecution, as a part of its case, establish the fact that the accused, in such case as this, sold intoxicating liquor, believing or having reason to believe or suspect that it was to be used as a beverage.

It is pointed out by counsel that the ordinance in question in the matters above cited is a copy of a part of Chapter 98 of the Session Laws of 1915 relating to intoxicating liquors. That part of said act was construed by this court in *McLean v. The People*, 66 Colo. 486, 180 Pac. 676. We there said of the act:

"The act includes within its provisions intoxicating liquors of every kind and character which now are in use, or which in the future may come into use as a beverage, no matter by what name they may be named or called, and no matter how small a percentage of alcohol they may contain, and no matter what other ingredients may be in them."

In that case it was contended that the court erred in refusing to give instructions which limited the operation of the statute to liquors generally and popularly known as intoxicating, unmixed with any other substance; that it did not apply to articles containing alcohol not classed as intoxicating beverages, but used for culinary, medicinal or toilet purposes. The refusal of this instruction was held by this court not to be error. It was also held that it was no error to refuse an instruction to the effect that the sale of intoxicating liquors must have been made either by the defendant personally, or by an agent under his instructions, with his full knowledge and consent.

It was further claimed that an instruction making good faith in the sale a defense, should have been given, but this court held otherwise. This answers the question above stated.

It was pointed out in that case that the handling of intoxicating liquors for medicinal purposes is provided for in the law, and that the defendant, having made no attempt

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to comply with that part of the statute which permitted him to handle intoxicating liquors for such purposes, cannot defend upon the ground of his good faith. We said: "He should have thought of this before and brought himself within the statute which permitted him to handle intoxicating liquors for medicinal purposes." Upon the authority of that case, it must be held that the court erred in giving instruction number three, as to good faith, and in refusing to give instructions tendered by the plaintiff to the contrary effect. This, of course, determines also that evidence as to good faith was inadmissible.

The court admitted evidence of the fact that other drug stores kept "Beef, Iron and Wine" for sale, and were not prosecuted. Defendant in error contends that this evidence was not admitted as a defense, but as having a bearing upon the testimony of the prosecuting witness, the Chief of Police.

If this testimony has any bearing upon the question, it is so remote and indefinite as not to be admissible. That others sold the article in question and had not been prosecuted, was a matter which, if shown in evidence, might be supposed by the jury to have a bearing upon the question of the defendant's guilt. Evidence of other offenses having that effect is not admitted, except in a class of clearly defined cases, where such evidence is necessary to show intent, or some other matter pertinent to the issue. The sale by the corporation, while the store was in the charge of defendant, is a case within the statute.

It is further contended that the city had no right of appeal on the ground that the act made an offense by the ordinance was also punishable by general statute.

This question is determined adversely to defendant in error in *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 516, where it is said that there is no reasonable ground for the distinction claimed.

The court having admitted incompetent evidence, and erred in the giving of instructions, and in refusing others, the judgment is reversed.

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MR. CHIEF JUSTICE SCOTT and MR. JUSTICE ALLEN concur.

No. 9711.

WERTZ v. LAWRENCE.

Decided February 7, 1921.

Action for slander. Judgment for plaintiff.

Affirmed.

1. SLANDER—*Evidence.* In an action for slander, evidence with reference to a prosecution for lunacy instituted by the defendant, is relevant on the questions of good faith and malice.

2. APPEAL AND ERROR—*Instructions—Exceptions.* Error based on instructions will not be considered where the abstract of record contains no exceptions to the giving of such instructions. Rule 7.

3. SLANDER—*Publication.* Further publication by the plaintiff of the slander is no defense.

4. *Probable Cause.* Probable cause is no justification in an action for slander.

5. *Damages—Proof.* Falsely charging a school teacher with insanity is actionable *per se*, and proof of specific damages is unnecessary.

6. *Excessive Damages.* A verdict for $1500 in an action for slander, not disturbed as excessive.

7. TRIAL—*Argument of counsel.* Failure to specifically instruct the jury to disregard portions of the argument of counsel, is not ground for reversal, where there is evidence, though very slight, upon which the fact could be claimed to be as assumed by counsel in his argument.

Error to the District Court of Rio Grande County, Hon. Jesse C. Wiley, Judge.

Mr. JAMES P. VEERKAMP, for plaintiff in error.

Mr. JESSE STEPHENSON, for defendant in error.

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Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

NETA Lawrence brought suit against John Wertz with one count for slander, charging her with insanity, and a second for malicious prosecution, the institution of lunacy proceedings against her. Upon the first trial the second count was abandoned and the plaintiff had verdict and judgment for $1100 upon the first count. That judgment was reversed in this court. 66 Colo. 55, 179 Pac. 813. At the second trial the plaintiff had a judgment for $1500, against which the present writ of error is prosecuted.

Plaintiff in error claims that the evidence of witnesses Moniger, Miller and Wilson, with reference to the prosecution for lunacy, was erroneously admitted, because it referred to an abandoned cause of action. The only objection to it which we find in the abstract is that it would burden the record by proving facts that were admitted, not that it was irrelevant to the issues; however, the evidence was relevant to the issues on the first count as to good faith and malice, and the court in the instructions restricted it to those issues.

The court, in stating the issues to the jury, referred to statements in the second cause of action concerning humiliation and distress of mind, as if they were a part of the first cause of action, and it is now claimed that this was a submission of the second cause of action to the jury. The instructions taken as a whole are very clear that no such submission was made, and we find no exception to the instructions, on this ground, in the abstract of record. See Rule 7.

The defendant requested the court to instruct the jury that if the plaintiff gave publicity to and further published what defendant had said of her mental condition she could not have a verdict. The court refused the instruction, we think correctly. No authority is cited and we know of no such law.

The defendant also asked, in effect, for an instruction

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that if the defendant had reasonable ground to believe the plaintiff was insane, and in good faith did believe it when he made the charge, the plaintiff could not recover. This instruction was refused. Probable cause is justification in malicious prosecution, but not in slander. 25 Cyc. 321, 413-416 and cases cited.

It is claimed no damages were proved, but the charge is actionable *per se*. *Wertz v. Lawrence,* 66 Colo. 55, 179 Pac. 813.

It is claimed the damages were excessive. We cannot say so. The jury had better opportunity to judge than we.

In argument, counsel for plaintiff referred to a matter which, it is claimed, was not shown by the evidence. The defendant's counsel objected and asked the court to instruct the jury to disregard this remark. The court admonished the counsel for the plaintiff to "confine his argument to the evidence," and was obeyed. The failure to specifically direct the jury to disregard what had been said is urged as ground for reversal but we cannot regard it so. There was evidence, very slight, but evidence, upon which counsel for plaintiff had a right to claim the fact to be as he assumed it to be.

The judgment should be affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD concur.

No. 9713.

RYAN, ET AL. *v.* THE COLORADO POSTAL TELEGRAPH CABLE COMPANY.

Decided February 7, 1921.

Action against a telegraph company for damages occasioned by failure to deliver a telegram. Judgment for plaintiffs.

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Affirmed.

1. TELEGRAPH COMPANIES—*Interstate Carriers—Federal Questions.* Under the interstate commerce act as amended June 18, 1910, all controverted matters pertaining to rates and regulations of telegraph companies doing an interstate business, are exclusively federal questions and state courts are bound by the federal decisions thereon.

2. *Liability for Non-delivery of Telegram.* The conditions upon the back of a telegraph blank furnished by a company doing an interstate business, to the effect that the company shall not be liable for mistakes, delays or non-deliveries beyond the cost of the telegram, if it be an unrepeated message, and not more than fifty times such cost if it be a repeated message, held to be valid and binding, notwithstanding the admitted negligence of the company and great loss occasioned by its failure to deliver a message.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. PATRICK D. CONNOR, for plaintiffs in error.

Messrs. DANA, BLOUNT & SILVERSTEIN, for defendant in error.

Department Three.

MR. JUSTICE BAILEY delivered the opinion of the court.

PLAINTIFFS brought suit to recover damages from the defendant corporation, The Colorado Postal Telegraph Cable Company, for its negligent failure to deliver a telegram. The facts are undisputed. Plaintiffs gave the message to the superintendent of the company at Denver for transmission to New York City. It was wired to Chicago, and there lost. The message was located in Chicago upon search by the Denver office on complaint of plaintiffs. It is also undisputed that through failure to deliver the message plaintiffs suffered a loss of $1,500.00. Upon this state of facts both parties moved for a directed verdict, and the court directed one for plaintiffs in the sum of eighty cents, upon which judgment was entered, that being the amount

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paid by them for transmission of the message. Plaintiffs bring the judgment here for review on error.

The trial court held that the conditions upon the back of the telegraph blank furnished by the defendant company in receiving messages were valid and binding on all patrons. It is there stipulated that the telegraph company shall not be liable for mistakes, delays or non-deliveries, whether caused by the negligence of its servants or otherwise, beyond the cost of the telegram, if it be an unrepeated message, and not for more than fifty times such cost if it be a repeated message. The message here involved was an unrepeated one.

It is urged by plaintiffs that the law in this jurisdiction will not permit telegraph companies to contract for immunity against their own negligence. In support of this contention are cited *Western Union Tel. Co. v. Graham*, 1 Colo. 231, 9 Am. Rep. 136; *Western Union Tel. Co. v. Cornwall*, 2 Colo. App. 491, 31 Pac. 393; *Postal Tel. Co. v. Barwise*, 11 Colo. 335, 53 Pac. 252; and *Western Union Tel. Co. v. Eyser*, 2 Colo. 141. These cases, however, were all determined prior to the passage of the amendment to the Interstate Commerce Act. This amendment was adopted by the act of June 18, 1910, and that portion relative to telegraph companies is as follows, found in volume 36, U. S. Statutes at Large, page 538:

"The provisions of the act shall apply * * * to telegraph, telephone and cable companies, * * * engaged in sending messages from one state, territory, or district of the United States, to any other state, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning of this act. * * * All charges made for any service rendered or to be rendered * * * for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such services or any part thereof is prohibited and declared to be unlawful: Provided, that messages by telegraph,

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telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

Section 15 of the amended act vests in the Interstate Commerce Commission full and exclusive jurisdiction in the first instance of all questions relative to the reasonableness, or the reverse, of all rates and tariffs for the transmission of messages by telegraph or telephone, and also all questions relative to the regulation and practice of such carriers, as to whether their rates and regulations be preferential, or otherwise unjust or unlawful.

The sole question for determination is whether the stipulation as to the liability of the company is valid and binding. In deciding this question we are precluded from considering the cases from our own jurisdiction, because the passage of the Interstate Commerce Act, and the adoption of the amendment, have taken the matter from the courts of the several states and made it exclusively a federal question. *Gardner v. Western Union Tel. Co.*, 231 Fed. 405, 145 C. C. A. 399. Since this court is bound by the federal decisions upon such questions, the case at bar is ruled by the holdings of the Supreme Court of the United States. In *Postal Telegraph Cable Company v. Warren-Goodwin Lumber Company*, 251 U. S. 27, 40 Sup. Ct. 69, 64 L. Ed. 118, determined in December, 1919, the question was whether the Interstate Commerce Act as amended excluded state action in reference to interstate business of telegraph companies, and limited the liability of such companies to the terms of their stipulations on the back of their telegraph blanks. After discussing numerous state and federal cases touching these questions the court said, at page 30:

"In the second place, as in terms the act empowered telegraph companies to establish reasonable rates, subject to the control which the act to regulate commerce exerted, it follows that the power thus given, limited of course by

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such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of liability where such rate was charged, since as pointed out in the Primrose case, (154 U. S. 1) the right to contract on such subject was embraced within the grant of the primary rate-making power."

In *Western Union Tel. Co. v. Boegli*, 251 U. S. 315, 40 Sup. Ct. 167, 64 L. Ed. 281, it was held that the Act of 1910 was not to be narrowly construed, to preserve any reserve power in the several states, and that the Act left no room for exercise by a state of regulative power, by penalizing any negligent failure to promptly deliver an interstate telegram.

The latest pronouncement of the Supreme Court of the United States upon the precise question here involved is found in *Postal Telegraph Cable Co. v. Dickerson*, a memorandum opinion reported in U. S. Supreme Court Advance Opinions, No. 4, January 1st, 1921. Suit was by Dickerson against the telegraph company in a Mississippi state court, for actual and punitive damages on account of the alleged failure of the defendant to transmit and deliver an interstate telegram within a reasonable time, wherein plaintiff recovered substantial damages, which judgment was affirmed by the Supreme Court of that state. On certiorari to review the judgment of the Supreme Court of Mississippi, the United States Supreme Court held that the case was ruled by *Postal Telegraph Cable Co. v. Warren-Goodwin Lumber Co.*, and *Western Union Telegraph Co. v. Boegli, supra*, and the judgment of the state court was reversed.

In view of the federal decisions, which are binding on us, the judgment of the trial court must be affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE concur.

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No. 9715.

ESSELSTYN, ET AL. *v.* THE UNITED STATES GOLD CORPORATION.

Decided February 7, 1921. Rehearing denied March 7, 1921.

Action on injunction bonds. Judgment for plaintiff.

Affirmed.

1. INJUNCTIONS—*Bond—Signature of Principal.* Under secs. 163 and 172 of the Colorado code, relative to injunction bonds, failure of the principal to sign such bond does not render it invalid.

2. *Bond Executed After Issuance of Writ.* It is immaterial whether an injunction bond is given before or after the issuance of the writ, where the purpose and effect in the interest of the plaintiff in the suit is undisputed.

3. *Bond—Approval by Clerk—Presumption.* In the absence of a showing that the clerk was without authority to approve injunction bonds, it may be assumed that such approval was regular and authorized.

4. *Injunction Bonds—Action on—Elements of Damage.* If the injunctive relief sought is ancilliary merely, expenditures made upon the main case cannot be properly claimed as damages in a suit on the bond. On the other hand, if it is impossible to dissolve the injunction without a hearing upon the merits, all expenses connected with such trial, including attorney fees, are proper elements of damage.

Error to the District Court of Boulder County, Hon. Neil F. Graham, Judge.

Mr. W. E. CLARK, for plaintiffs in error.

Mr. JOHN R. WOLFF, Mr. CLARENCE M. HAWKINS, Mr. HORACE N. HAWKINS, for defendant in error.

MR. JUSTICE BAILEY delivered the opinion of the court.

THIS is a suit for damages on account of the alleged wrongful issuance of temporary and permanent injunction writs in a suit wherein J. N. Esselstyn was plaintiff and the U. S. Gold Corporation defendant. That action was

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determined in favor of the defendant company and the injunction dissolved. The company then brought this action for damages on the injunction bonds. Two separate causes are alleged in the complaint. On the first plaintiff was awarded $1,000.00 and on the second $12,831.31, aggregating a total of $13,831.31, which judgment is here for review on error.

Defendants demurred to the complaint on the ground that facts sufficient to state a cause of action were not set forth in either count of the complaint. The demurrer was later amended to show also that there was a misjoinder of parties defendant, as one of the bonds was signed by the surety company only. The demurrer was overruled. The pleadings disclose that the issues are whether the undertakings had been duly executed, and whether plaintiff had sustained damage by reason of their issuance.

Trial was to the court. Defendants objected to the introduction of all testimony, including documentary evidence, and at the conclusion of plaintiff's case demurred to the evidence, which demurrer was overruled. Thereupon, without introducing any testimony, the defendants rested, and upon the uncontroverted evidence, findings and judgment were entered as above indicated. Many errors are assigned, only a few of which deserve consideration.

It appears that Esselstyn failed to sign the bond upon which the second cause of action is based. It is therefore urged that the surety company is not liable thereon.

Section 163 of the Code provides, *inter alia,* that:

"And no injunctions shall be issued until the complainant or complainants, or some one for him, her or them, shall have previously executed such undertaking with sufficient surety, payable to the defendant or defendants * * * which undertaking shall be conditioned to pay all such costs and damages as shall be awarded against the complainant or complainants, in case the injunction shall be modified or dissolved, in whole or in part."

And Section 172 is in part as follows:

"On granting an injunction, the court or judge shall re-

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quire * * * a written undertaking on the part of the party in whose favor an injunction is granted, with one or more sufficient sureties, to the effect that the plaintiff will pay to the party enjoined all damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decides that the party in whose favor the injunction was issued was not entitled thereto."

There is a wealth of authority to the effect that bonds in judicial proceedings are valid without the signature of the principal. The general rule as to injunction bonds is stated in 22 Cyc. 922, as follows:

"It is generally held that the complainant himself need not sign the bond."

In *Brown v. Melloon*, 170 Iowa 49, 152 N. W. 75, reported also in Ann. Cas. 1917C, at page 1070, in discussing the effect of a judicial bond not signed by the principal, it is said:

"Practically all the cases holding that a bond is invalid and unenforcible if not signed by the principal were decided upon the theory that the instrument itself created the only obligation of the principal; or that the statute expressly required the signature of the principal; or that the sureties would in some manner be prejudiced because of the failure of their principal to sign, or because it was within the contemplation of the parties that the principal should sign before delivery, or the liability created was joint only, and not joint and several. This statement will be confirmed by an examination of the following, which are usually cited in support of the contention that a bond not signed by a principal is of no validity. (Citing cases.) The current of modern authority is to the effect that, in the absence of statute expressly requiring it, a judicial bond signed by sureties alone is valid and may be enforced. They proceed upon the theory that, as the signature of the principal adds nothing to his liability, and the want of it takes nothing away from the sureties, and in no manner increases their burdens, or robs them of any of their rights, the failure of

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the principal to sign does not affect the validity of the bond." (Citing cases.)

It is to be observed that our statute relative to such obligations does not specifically require the signature of the principal to make the instrument valid and binding.

In a note discussing the more modern cases, which is attached to *Brown v. Melloon, supra,* Ann. Cas. 1917C, 1073, it is said:

"It is obvious that the substantial interest of a surety in having the principal sign the obligation is satisfied if the principal is in any manner so bound that he is primarily liable to the obligee and is liable over to the surety in the event of a payment by the latter. Therefore the recent cases are in substantial accord in holding that if the principal is independently bound to a primary liability his failure to sign the obligation does not exonerate the surety."

That the liability of principals upon an injunction bond is joint and several, and that it is not necessary for either of two principals to sign such instrument, is held in *Smith v. Atkinson,* 18 Colo. 255 (32 Pac. 425) where at page 257 it is said:

"It was not necessary for either Smith or Tabor to sign the undertaking; their liability depended not upon the undertaking, but upon the antecedent wrongful suing out of the writ of injunction."

It is admitted that Esselstyn received the benefit of the injunction, as a condition to the issuance of which he was required to file the bond in question, and he should not be heard to say that, having deliberately failed to comply with his duty in this respect, he may now reap an advantage therefrom, nor is the surety company in any better position in this respect than Esselstyn himself.

Defendants contend that there was no legal liability against them on the thousand dollar bond because, first: no writ of injunction issued after the filing thereof; and second that the clerk who approved the bond had no authority to do so. As to the first contention the record shows that defendant obtained the temporary restraining order con-

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ditioned upon his filing an emergency bond of $300.00, and a further additional bond of $1,000.00; that these bonds were filed and approved by the clerk upon the order of the court; that the writ thereupon issued; later the surety company upon these bonds withdrew, and still later Esselstyn filed two other bonds in lieu of the original ones, one of which, the $1,000.00 bond, is here in controversy. These bonds were also approved by the clerk. It clearly appears that the second bonds were given to keep in force the injunction writs already issued, and it is absolutely immaterial whether they were given before or after the issuance thereof, since their purpose and effect, in the interest of plaintiff in that suit, is manifest and undisputed. In the absence of a showing that the clerk was without authority to approve these bonds it may be fairly assumed that such approval was regular and authorized. In any event, they were voluntary common-law obligations, founded upon a good consideration, and the defendants are liable thereon. *Swofford Bros. Dry Goods Co. v. Livingstone,* 16 Colo. App. 257, 65 Pac. 413; *Smith v. Stubbs,* 16 Colo. App. 130, 63 Pac. 955; *McKenzie v. Porter,* 40 Colo. 340, 91 Pac. 916; *National Surety Co. v. People,* 54 Colo. 365, 130 Pac. 843.

No other assignments merit attention except those going to the question of what expenses incurred by defendant can be said properly to have been caused by the issuance of the writ. It is urged that much of the work and labor done and attorneys' fees expended were so done and expended in preparing the case for trial upon the merits, and not in having the injunction dissolved. It is claimed, however, and there is undisputed evidence in support thereof, that it was necessary to try the case fully in order to determine whether the injunction was wrongfully issued. It is clear and undisputed if the injunctive relief sought was ancillary merely, then that any expenditures made upon the main case could not be properly claimed as damages. On the other hand, if it were impossible to dissolve the injunction until trial of the case upon its merits, all expenses connected with such trial are proper elements of damage.

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In *Littleton v. Burgess*, 16 Wyo. 58, 91 Pac. 832 reported with exhaustive annotations in 16 L. R. A. (N. S.) 49, the question of the proper measure of damages in suits on injunction bonds is fully discussed. At page 60, as reported in L. R. A. the court said:

"It is urged that damages, within the terms of the undertaking, do not include attorneys' fees, and that, as the trial court had no jurisdiction to issue the writ, there was no occasion or necessity to employ counsel. The Supreme Court of Alabama, in *Rosser v. Timberlake*, 78 Ala. 162, said: 'It is a mistake to suppose that, because there is no proof of present injury caused by the injunction and restraining order, there was no occasion to employ counsel to defend against it. Any suit brought, if not defended, may result in costs, if not in a more grievous wrong against defendant. It does not lie in the mouth of a complainant, who has forced another into court, to claim exemption from liability on the plea that his suit was so harmless or frivolous as not to call for defense.' In the case before us the plaintiffs in error forced the defendant in error into court to determine at least a question of jurisdiction,—a question which was a judicial one, and which he could not determine himself,—and to ignore the writ might have resulted in great wrong to him. No obligation rested upon him to ignore the writ, even though it was issued without jurisdiction. *Robertson v. Smith, supra.* His right to defend either upon the merits, or upon jurisdictional grounds, accrued to him upon the service of the writ (*Walton v. Develing*, 61 Ill. 201), and by no sophistry of reasoning could he be barred of that right. The right having so accrued, he had the right to be represented by counsel. If the attorneys' fees were incurred to procure the dissolution of the injunction, then, by the great weight of authority, the defendant in error was damaged to that extent, 22 Cyc. Law & Proc., p. 1053, and cases there cited."

In High on Injunctions, section 1687, the rule is thus stated:

"Where a motion for a dissolution is properly made by

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defendant and is denied, not upon the merits, but because the court in its discretion declines to go into the merits before the final hearing, and upon such final hearing the injunction is dissolved, the expenses of the motion to dissolve are properly allowable as damages. And in such case, the final trial being necessary to dissolve the injunction and defendant being required to submit to it until such hearing, counsel fees for the trial may be allowed."

It appears from the record that the primary and principal relief sought in the original action was a permanent injunction. On this point this court in the opinion in the original case, *Esselstyn v. The United States Gold Corporation*, 59 Colo. 294, (149 Pac. 93), at page 298, said:

"It appears from the pleadings that the action is in equity, wherein plaintiff seeks to enjoin defendant from pursuing its Cross vein, under its alleged apex rights, in its downward course into the Alpine Horn claim. Plainly the primary object of the suit was for injunctive relief, and that fact determines its equitable character. The damage sought was a mere incident. The cause was properly triable to the court and plaintiff had no lawful right either to demand or have a jury. If a jury had returned a verdict, it would have been advisory merely, and might have been either adopted or rejected by the court, in its discretion. *Danielson v. Gude*, 11 Colo. 87, 17 Pac. 283; *Coal Co. v. Coal Co.*, 24 Colo. 116, 48 Pac. 1045; *Cree v. Lewis*, 49 Colo. 186, 112 Pac. 326; *Selfridge v. Leonard-Heffner Co.*, 51 Colo. 314, 117 Pac. 158, Ann. Cas. 1913B, 282; *Neikirk v. Boulder National Bank*, 53 Colo. 350, 127 Pac. 137."

It also appears that the trial court held it impossible to pass upon the motion to dissolve the injunction without going fully into the merits of the case. Indeed, the record conclusively shows that the whole matter was disposed of on motion to dissolve the injunction, and, by the weight of authority, under such circumstances, attorneys' fees are recoverable as for the defense of the main case. 22 Cyc. 1054, 1055.

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We find no prejudicial error in the record, and the judgment is affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE concur.

No. 9746.

CITY OF FORT COLLINS *v.* THE PUBLIC UTILITIES COMMISSION OF COLORADO, ET AL.

Decided February 7, 1921. Rehearing denied March 7, 1921.

Proceeding to review an order of the public utilities commission concerning telephone rates within the limits of a home rule city.

Order Annulled.

1. CONSTITUTIONAL LAW—*Legislative Enactment.* Neither an act of the legislature, referred or unreferred, nor an initiated law, can recall any power or privilege granted by the constitution.

2. PUBLIC UTILITIES COMMISSION—*Jurisdiction—Home Rule Cities.* The state public utilities commission has no authority to regulate telephone rates in a city, which, after the passage of the home rule amendment in 1912, S. L. 1913, p. 669, adopted a charter giving it control of the rates to be charged by public utilities within its limits.

Writ of Review to the Public Utilities Commission.

MR. FRANK J. ANNIS, for petitioner.

MR. MILTON SMITH, MR. CHARLES R. BROCK, MR. W. H. FERGUSON, MR. ELMER L. BROCK, for respondents.

MR. FRANK L. MOORHEAD, *amicus curiae.*

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THIS case is brought here under the statute to review

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the order of the Public Utilities Commission as to telephone rates in Fort Collins.

The City of Fort Collins, after the passage of the Home Rule Amendment in 1912, S. L. 1913, p. 669, adopted a charter which gives that city control of the rates to be charged by public utilities within its limits. A controversy has arisen as to whether, under these circumstances, the city has a right to control such rates or whether, by virtue of the Act of 1913, S. L. 1913, p. 464, and the amendments thereto, such control belongs to the Public Utilities Commission of the State.

By the expediency or consequences of the decision of this question we cannot be governed. It is too late to further question the right to regulate rates on the ground of due process, and the question of the validity of the methods of regulation provided by the City of Fort Collins is not before us. The present question is whether the control belongs to the State Commission.

We have held that when a city has adopted such a provision before the passage of the Home Rule Amendment the State Commission has no control of rates within that city. *Denver v. Telephone Co.*, 67 Colo. 225, 184 Pac. 604; *Pueblo v. Pub. Ut. Com.*, 68 Colo. 155, 187 Pac. 1026; *Atchison &c. Ry. Co. v. Pub. Ut. Com.*, 68 Colo. 92, 188 Pac. 747. We did this partly on the theory that the 20th amendment of our constitution gave a city the right to adopt such a charter and partly on the ground that the Home Rule Amendment ratified such provisions, they having been made before its passage. The present case presents the question whether, without such ratification, the 20th amendment or the Home Rule Amendment or both together authorize the city to adopt such a provision.

It is clear that the 20th amendment itself authorizes such an adoption. The arguments in the several opinions in the case of *Denver v. Telephone Co., supra,* seem to settle this question. The Home Rule Amendment was intended to reiterate unmistakably the will of the people that the power of a municipal corporation should be as broad as possible

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within the scope of a Republican form of government of the State, and, viewed in that light, it is a valuable guide in interpreting the 20th amendment.

Interpreting the 20th amendment in the light of the Home Rule Amendment or without it, a municipal corporation has power to assume the regulation of rates, because such body may assume whatever power the legislature might grant; *Denver v. Hallett,* 34 Colo. 395, 397, 83 Pac. 1066, and the legislature might grant the power to regulate rates; *Home Telephone Co. v. Los Angeles,* 211 U. S. 265, 271, 29 Sup. Ct. 50, 53 L. Ed. 176; see 184 Pac. 611. The two amendments taken together confirm this conclusion beyond question. Moreover the argument for the respondent involves the proposition that the Home Rule Amendment was intended to give authority to regulate rates to some cities and not to others, which is almost incredible.

It is suggested that Sec. 8 of Art. 15 of the Colorado constitution precludes the grant to cities of the power to regulate rates. We do not see in that section anything that relates to or affects the question before us. The principal case cited on that point, *Sedalia v. The Pub. Ut. Com.,* 275 Mo. 201, 204 S. W. 497, has no bearing upon the present case. In that case the question was, as stated in the opinion, page 209,

"Can the legislature authorize a municipal corporation or a public service corporation to make a contract as to rates which contract will preclude the sovereign power of the State from fixing reasonable rates irrespective of the contract?"

There is no such question here. The question before us is not whether the sovereign power is precluded from fixing rates, but whether power to regulate rates has been given, and whether, when the People of the state, by constitutional amendment have given such power, the legislature can take it away.

Neither an act of legislature, referred or unreferred, nor an initiated law, can recall any power or privilege granted by the constitution.

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It follows that the State Public Utilities Commission has no authority to regulate telephone rates in the City of Fort Collins.

The respondent commission is directed to annul its order of November 29th, 1919, and dismiss the proceedings before it so far as the same concern the telephone rates between points within the City of Fort Collins.

MR. JUSTICE BAILEY and MR. JUSTICE WHITFORD not participating.

No. 9754.

FIRST NATIONAL BANK OF LAMAR, COLORADO, v. ROBERTS.

Decided February 7, 1921. Rehearing denied April 4, 1921.

Action on promissory note. Judgment for defendant.

Reversed.

1. APPEAL AND ERROR—*Verdict.* In an action on a promissory note, the defense being payment, where there is testimony tending to support the contentions of both parties, a verdict will not be disturbed on the alleged ground of insufficient evidence.

2. CONTINUANCE—*Motion for—Admission as to Evidence.* On a motion for continuance by defendant, plaintiff admitted that if an absent witness were present she would testify to the payment of a note at a time alleged in the affidavit filed in support of the motion; on the trial, defendant attempted to prove a different time of payment. *Held*, that where an admission of evidence is obtained based wholly upon an allegation of time and place and the party is surprised on the trial by evidence of another time or place, the judge ought to give relief to the party so misled to his injury.

Error to the District Court of Prowers County, Hon. A. F. Hollenbeck, Judge.

Messrs. HILLYER & KINKAID, for plaintiff in error.

Messrs. TODD & UNDERWOOD, for defendant in error.

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Department Three.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error brought this action against defendant in error to recover on a promissory note for the principal sum of $100. The defense pleaded was payment. The cause was tried to a jury and from a verdict and judgment in favor of defendant in error plaintiff brings the cause here for review.

Defendant testified that he paid the note in question. The evidence on behalf of plaintiff was that he did not. There was corroboration of both, hence the verdict cannot be disturbed on the alleged ground of insufficient evidence. *Hallack et al. v. Stockdale et al.*, 14 Colo. 198, 200, 23 Pac. 340.

When this cause came on for trial defendant moved for a continuance on the ground of the absence of the witness Mrs. Edna H. Sellers. The affidavit in support of this motion read in part as follows:—

"That Mrs. Edna H. Sellers whose place of residence is Parsons, Kansas, is as I am informed and verily believe a material witness in my behalf herein without whose testimony I cannot safely proceed to trial of the above entitled cause. That I paid the note upon which this action is based at some date in the late spring or early summer of the year 1913, the exact date of such payment having passed from my memory at the present time."

The plaintiff, then having in its possession the written admission of defendant under date of October 19, 1914, that the note had not at that date been paid, (which evidence it produced at the trial) and having no knowledge of any relationship existing between the witness Sellers and the defendant, admitted that the witness would, if present, testify as alleged. On the trial defendant admitted the falsity of the affidavit as to the date of the alleged payment and fixed said payment at some indefinite date after October 19, 1914. He further testified "This lady (referring to Mrs. Edna H. Sellers) is a friend of my wife's." After the trial plaintiff

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learned that Mrs. Edna H. Sellers was in fact the daughter of defendant and his wife. By reason of the foregoing facts the plaintiff, in its motion for a new trial, set up as one of the grounds thereof surprise and undue advantage, arising from the affidavit and the concealed relationship between the defendant and the witness Sellers. The 4th assignment of error reads:—

"That the court erred in denying the application for a new trial based on the ground that the plaintiff was taken by surprise by evidence adduced by the defendant."

It is very apparent that but for the date of payment as fixed in this affidavit and the concealment of the relationship between defendant and the witness, plaintiff, with defendant's written admission in its possession that payment was not so made, would never have admitted that this witness, if present, would testify as alleged, and thereby have waived its right to try her evidence by the acid test of cross examination.

"If an allegation of time and place is made and a party has prepared his evidence based wholly upon the allegation, and is surprised at the trial by the offer of evidence of another time or place, the judge will and ought to give the opportunity to meet the evidence of the adverse party." *Brown v. Western Union Tel. Co.*, 169 N. C. 509, 511, 86 S. E. 290, 291.

It is equally true that if an admission of evidence be obtained, based wholly upon an allegation of time and place, and a party is surprised at the trial by evidence of another time or place, the judge will and ought to give relief to the party so misled to his injury.

An admission that an absent witness would, if present, give certain testimony, involves a waiver of the right of cross examination. Hence considerable particularity is required in setting forth such testimony. An adversary must not be deceived as to the risk assumed. Sharp practice in this matter is not to be tolerated. One who is misled to his injury by such methods is not thereby bound; and a litigant

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indulging in them will not be permitted to retain an advantage so gained.

In the instant case defendant's palpable attempt to conceal a relationship which might, if disclosed, have thrown suspicion upon the testimony, by asserting that the absent witness, who was in fact his child, was "a friend of my wife's," adds strength to the presumption that the deception was intentional. The judgment is reversed and the cause remanded.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY concur.

No. 9775.

THE CALIFORNIA INSURANCE COMPANY OF SAN FRANCISCO v. DUDLEY, Administrator.

Decided February 7, 1921.

Petition for allowance of claim against an estate. Demurrer to petition sustained.

Reversed.

1. PROBATE LAW—*Demurrer to Petition for Allowance of Claim.* Where a petition presents a claim against an estate, good on its face of some class, though not of the first as alleged, it is error to sustain a demurrer thereto, and dismiss the petition.

2. PLEADING—*Demurrer.* A demurrer to a petition for the allowance of a claim against an estate admits the facts alleged.

3. PROBATE LAW—*Claims—Classification.* A claim against an estate for funds collected by decedent under an ordinary agency contract, is not of the first class.

Error to the County Court of El Paso County, Hon. W. P. Kinney, Judge.

Mr. HARRY C. DAVIS, Mr. STANLEY T. WALLBANK, for plaintiff in error.

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Mr. P. M. KISTLER, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error filed a petition in the County Court of El Paso County, alleging that defendant's intestate was indebted to it in a considerable sum for insurance premiums collected by him as agent of the claimant, and praying that the claim be allowed as of the first class. Defendant in error filed a general demurrer to the petition, which was sustained. The petition was thereupon dismissed. It is now urged that the court erred in said action because: (1) the money claimed was held in trust, and hence the claim was by statute (Sec. 7206 R. S. 1908) of the first class; and (2) because, if not of that class, it was at least a valid claim of some class.

Inasmuch as the petition presented a claim, good on its face, of some class, the court erred in sustaining the demurrer and dismissing the claim.

It is urged in argument on behalf of the plaintiff in error, that the insurance law of 1913 makes insurance agents who collect premiums, trustees in the technical sense of the term, hence a right to have the claim allowed as of the first class. We find nothing in the statute to justify this position.

The petition alleges, among other things, that the decedent, at the time of his death, held funds of the petitioner, "as trustee," which may be true, though they were collected as insurance premiums, because of some contract creating a trust. The demurrer admits the fact alleged. It should, therefore, have been overruled and the claimant permitted to prove its case as of whatever class the evidence showed it to be. That it is not of the first class, if the funds are collected under an ordinary agency contract, is settled by *McCutchen v. Osborne,* 61 Colo. 408, 158 Pac. 136, but the trial court was not justified in holding, on the allegations of the petition, that the funds were so held, or that if there was no claim of the first class, there was no claim at all.

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The judgment is reversed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE ALLEN concur.

No. 9776.

LINDSLEY, ET AL. v. CITY AND COUNTY OF DENVER.

Decided February 7, 1921. Rehearing denied April 4, 1921.

Proceeding involving the allowance of attorney fees by trial court. Order of allowance vacated.

Affirmed.

1. APPEAL AND ERROR—*Right of Trial Judge to Appear.* The fact that a petition to a court of review for a writ of certiorari alleges that the trial court removed a receiver without notice to the parties in interest; that the order was arbitrary in character and made without jurisdiction, gives the trial judge no right to appear in the appellate court, either in person or by attorney, to defend his judgment.

2. CERTIORARI—*Question Involved.* In a review on certiorari, the only question to be considered is that of jurisdiction, and whether the trial court acted arbitrarily, or justly and wisely, is wholly immaterial.

3. ATTORNEY FEES—*Allowance by Court.* A county, not a party to a suit and having no interest in it, cannot be made liable therein for attorney fees by order of the trial court.

Error to the District Court of the City and County of Denver, Hon. A. C. McChesney, Judge.

MR. THOMAS R. WOODROW, MR. H. E. LUTHE, MR. SAMUEL E. MARSHALL, MR. HENRY A. LINDSLEY, for plaintiffs in error.

MR. JAMES A. MARSH, MR. ERNEST MORRIS, for defendant in error.

En banc.

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MR. JUSTICE TELLER delivered the opinion of the court..

THIS is a controversy growing out of the removal of the receiver of The Yule Marble Company by Judge Mullins, sitting as a judge of the District Court of the City and County of Denver. Parties aggrieved by the order of removal obtained from this court a writ of certiorari, on a petition alleging that the court was without jurisdiction to enter the order under the circumstances of the case. Later, on a petition alleging that the court was about to proceed further in the receivership matter, a writ of prohibition issued out of this court, directed to said court and the judge thereof. After the issue of the two writs the District Court entered an order that the plaintiffs in error be allowed $1,000 each for their services in the matters of certiorari, and prohibition pending in this court, the same to be taxed to the City and County of Denver.

Thereupon the city filed its petition in intervention, with a petition that the order charging the city with said attorney's fees be vacated. In the meantime the term of office of Judge Mullins had expired. His successor in office called in a judge from another district, who, on a hearing had, vacated said order. The cause is now here on error.

For the plaintiffs in error it is contended that the petitions filed in this court attacked the District Court, impugned the motives of the judge, and thus reflected on the court, as such; because of which he is entitled to defense in this court. We are unable to agree with this proposition, either as a statement of fact, or as a conclusion of law. The petition for the writ of certiorari alleged that the order removing the receiver was made without notice to the parties in interest, was arbitrary in character, and made without jurisdiction in the court to make it. If such were the facts the court committed error; and no judge, it will be presumed, is pleased by a finding that he has committed error in a cause. That fact, however, gives him no right to appear, either in person or by attorney, to defend his judgments.

The dignity of the court, which counsel say was attacked

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by the petitions, was no more involved than it is in any case in which error is charged. If there was any suggestion of wrong motives on the part of the judge, this is not the forum in which he may find relief therefor.

In a review on certiorari the only question to be considered is that of jurisdiction. Whether the court acted arbitrarily, or justly and wisely, is wholly beside the mark. There was, then, nothing before this court which involved the integrity, or good faith of the trial judge; nothing in which he had a right to appear or be represented. So far as this court is concerned, action by a trial court in excess of, or without jurisdiction, from a good motive, is neither better nor worse than thus acting from a bad motive. We have to determine only a single legal question.

In any event, if the question were one involving a public concern, the City of Denver, not being a party to the cause, and having no special interest in it, would be no more liable for attorney's fees in the matter than would be any other county of the state.

It appearing, thus, that the order allowing attorney's fees was wholly unauthorized by law, it is unnecessary to consider the other questions discussed in the briefs.

The judgment is affirmed.

No. 9781.

BADGER v. BADGER.

Decided February 7, 1921. Rehearing denied April 4, 1921.

Action by wife for separate maintenance and custody of minor children. Judgment for plaintiff.

Affirmed.

1. HUSBAND AND WIFE—*Separate Maintenance.* In an action by a wife for separate maintenance, evidence to the effect that her husband left her for many months, during which period he only gave her $35, justified an order that he contribute to her support.

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2. *Support of Children.* In an action for separate maintenance where an allowance is made by the court for the support of the wife and children in connection with the part of the decree giving her their custody, it is not necessary that the order specify the part to be paid for the support of the children.

3. CHILDREN—*Care and Custody of—Support.* When a court finds upon the question of custody of minor children that their best interest requires them to be left with the mother, it is proper to order the husband to pay for their maintenance.

4. JURISDICTION—*Domicile.* Where it appeared that a family had established a residence in Colorado, the fact that the husband with the children left that state for Missouri after being served with process in a suit for separate maintenance by the wife, would not divest the Colorado court of jurisdiction.

The question of residence is for the trial court, if it be necessary, to determine jurisdiction.

Every sovereignty exercises the right to determine the status of persons found within its jurisdiction, and if defendant's domicile had in fact been in Missouri, the court did not err in assuming jurisdiction of the cause.

5. HUSBAND AND WIFE—*Separate Maintenance.* Evidence of the wife's need of support and of the husband's ability to provide it is all that is required to authorize an order for her maintenance.

6. CHILDREN—*Custody of.* Where a trial court finds it to be for the best interest of minor children to be left in the custody of the mother, that is a proper reason for determining the question in her favor.

Error to the District Court of Weld County, Hon. Robert G. Strong, Judge.

Mr. H. N. HAYNES, for plaintiff in error.

Mr. CHARLES E. SOUTHARD, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error, the wife of plaintiff in error, began an action in the District Court of Weld County against plaintiff in error for separate maintenance and the custody of their three minor children. In connection with the action the plaintiff therein obtained an *ex parte* order restraining the defendant from leaving the jurisdiction of

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the court, and from taking the children away. Said order and the summons and a copy of the complaint were served upon the defendant on July 8, 1918, and on that day defendant with the three children left the state.

On August 24, 1918, the default of defendant was entered, and the court proceeded to hear the cause. The court found in favor of the plaintiff, and entered a decree awarding the custody of the children to her, and requiring defendant to pay $100 a month for the support of the plaintiff and the children.

Defendant brings error, and alleges that the court acted without jurisdiction; that the complaint does not state a cause of action, and that the findings are not supported by the allegations of the complaint, or the evidence introduced upon the trial. All the assigned errors may be discussed under these headings. We are not furnished with specific objections to the complaint, and are of the opinion that it states a cause of action.

Counsel urges that the restraining order was void because signed on Sunday, but inasmuch as his client ignored it, and the defendant in error claims nothing under it, we need not consider its validity.

As to the findings it is sufficient to say that there was evidence that the defendant had left his wife, for many months, with her father, at a time when she required nursing and medical attendance, and during said period had contributed but $35 to her support. This would seem to justify the court in considering it necessary, on the petition of the plaintiff, to order the husband to contribute to her support.

It is further objected that the sum fixed did not segregate a part to be paid for the support of the children. If that is important a correction can readily be obtained by motion in the trial court. It is true, as counsel states, that the plaintiff has not been shown to have been "burdened with the care of the children," but the allowance is made in connection with that part of the decree which gives her their custody.

It is further urged that the finding is that defendant had

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neglected to make provision for the plaintiff and the children. It is said the evidence is to the effect that he had supported the children. The finding, being in the conjunctive, is not contrary to the evidence, as he had not contributed to the joint support of the persons named. In any event, the finding as to the support or nonsupport of the children is unnecessary, because, upon the question of the right to custody of the children, in their best interest, the finding was in favor of the plaintiff. When the court had so found it had full authority to direct defendant to pay for their maintenance.

The objection to the jurisdiction is based upon a claim that the defendant's domicile was in the state of Missouri, and that his domicile was the domicile of the children. We find nothing in the record to support this claim. When the defendant was served with process, the entire family was in Weld County, the plaintiff and the children having resided there continuously since the preceding Christmas, and the defendant returning to Greeley from time to time. He was a civil engineer whose home was originally, at least, in Greeley, and the evidence discloses that in the practice of his profession he changed his location or abiding place as his work required. The plaintiff testified that in fourteen years, she had lived in thirteen different places. The only evidence in reference to Missouri, is that defendant told plaintiff that he intended to set up housekeeping in that state, and take the children there with him. The evidence shows that after leaving Weld County in pursuit of his work, the defendant and his wife frequently returned to Greeley from absences caused either by her sickness or his business. There is nothing to show that he ever established or claimed a domicile elsewhere than in Weld County. That county was therefore the proper place for the bringing of the action, and when service was had the court had jurisdiction to proceed, regardless of defendant's leaving the state with the children. It cannot be seriously maintained that by departing from the state he ousted the court of jurisdiction which had attached. The question of residence

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was one of fact to be determined by the trial court, if it were necessary in determining the jurisdiction.

But regardless of that question, we are of the opinion that, under the authorities, the court had jurisdiction of the subject matter of the cause, as it certainly had of the parties.

Counsel for defendant in error cite several authorities holding that the laws of a state may be invoked for the benefit of the resident of another state to protect his rights either against a citizen of the state in question, or of another state; and that the question presented for adjudication, in such cause will be determined according to the laws of the state in which the action is pending. This applies, of course, only in case a nonresident defendant is voluntarily within the state, and made the subject of an action. These holdings are clearly in accord with the principle that every sovereignty exercises the right of determining the status of persons found within its jurisdiction. It follows that though the defendant's domicile had in fact been in Missouri, the court did not err in assuming jurisdiction of the cause.

There is evidence of the plaintiff's need of support and of the defendant's ability to provide it, and that is all that is required to authorize the order.

In the briefs, references are made to matters not in the record, and they are used as foundations for arguments, but we cannot consider them. Nor do we think that if they were in the record they would furnish any ground for reversing this judgment. Neither need we consider the domestic differences of the parties, or of their respective fitness to have the custody of the children. The trial court found that it was for the best interest of the children that the mother have the custody of them. That is a proper reason for determining the question in her favor.

Finding no error in the record, the judgment is affirmed.

CHIEF JUSTICE SCOTT and MR. JUSTICE ALLEN concur.

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No. 9782.

RAILWAY MAIL ASSOCIATION v. JEFFREY.

Decided February 7, 1921.

Action for death benefit under a fraternal and benevolent society contract. Judgment for plaintiff.

Affirmed.

1. APPEAL AND ERROR—*Verdict.* A verdict supported by the evidence will not be disturbed on review.

2. TRIAL—*Remarks of Counsel.* Where it does not appear that the remarks of counsel, of which complaint is made, influenced the jury in arriving at its verdict, or resulted in substantial prejudice, the judgment will not be reversed on that ground.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. WALTER M. APPEL, Mr. FRANK EXLINE, for plaintiff in error.

Mr. JOHN D. MILLIKEN, Mr. L. J. STARK, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action brought by a beneficiary under a contract of a fraternal and benevolent society to recover a death benefit alleged to be due as the result of the accidental death of a member of the society. The defendant alleges, as its only defense, that the death was not accidental but was caused by suicide. The allegation is denied by the replication. The jury found the issue for plaintiff. There was a judgment on the verdict, and defendant has sued out a writ of error.

The principal contention of defendant relates to the evidence and to the trial court's refusal to direct a verdict for defendant. We find that the evidence supports the verdict, and that the court properly refused to direct a verdict.

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The evidence presented as tending to sustain the defense of suicide was entirely circumstantial. The record does not show and it does not appear that the remarks of counsel complained of influenced the jury in arriving at its verdict or resulted in substantial prejudice to defendant.

We find no reversible error in the record. The judgment is affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE TELLER concur.

No. 9803.

THE DENVER TRANSIT AND WAREHOUSE COMPANY *v.* BARTLE.

Decided February 7, 1921. Rehearing denied April 4, 1921.

Proceedings on motion to amend prayer of answer. Motion denied.

Reversed.

1. PLEADINGS—*Amendment—Equity.* After remittitur from the supreme court, it was error for the trial court to deny a motion to amend the prayer of the answer, so that the relief asked would correspond with the approved findings of the court and equities of the case.

Error to the District Court of Jefferson County, Hon. Harry S. Class, Judge.

Mr. JESSE H. SHERMAN, Mr. ARCHIBALD A. LEE, for plaintiff in error.

Mr. SAMUEL J. SACKETT, Mr. C. A. IRWIN, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THE facts material to a presentation of the nature of the

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cause here for review, and of the question to be determined, are as follows:

In 1913, the defendant in error, Fred C. Bartle, was accused of having embezzled from the plaintiff in error, The Denver Transit and Warehouse Company, the sum of $5,000. For the purpose of avoiding a criminal prosecution for embezzlement, Bartle delivered in escrow, and the Company subsequently received, a certified check for $2,000 and a note for $3,000, secured by a deed of trust. In 1915 proceedings were brought to foreclose the deed of trust, and thereupon Bartle brought suit to enjoin the foreclosure. The trial court found that at the time of the execution of the note and deed of trust, Bartle was indebted to the Company in the sum of $3,000 for moneys theretofore embezzled from it, and that the note and trust deed were given voluntarily and upon a good and valid consideration. Bartle then brought the cause to this court upon writ of error, and we held upon that review "that the dismissal of a criminal prosecution was the condition upon which the papers (note and deed of trust) were to be delivered" to the Company and that, for that reason, the note and trust deed must be cancelled. The cause was remanded for further proceedings in harmony with the views expressed in the opinion. *Bartle v. Bond,* 65 Colo. 367, 176 Pac. 832. When the cause was remanded to the trial court, the Company filed a motion to amend its prayer for judgment, as contained in its separate answer, so as to ask for a judgment against Bartle for $3,000 with interest and for body execution. The motion was denied, and to review the ruling in that respect the cause is now before us for review.

Our opinion and decision in *Bartle v. Bond, supra,* did not affect the decree of the trial court in so far as it found that Bartle was indebted to the Company in the sum of $3,000, and had embezzled that amount from it. The finding was within the issues and was relevant to the equities of the case. The principles of equity require the repayment of this money with interest. While Bartle was entitled to have the note and deed of trust cancelled, for

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the reasons stated in *Bartle v. Bond, supra,* at the same time the Company was entitled to relief on account of the money due it. As we said in the former opinion, "an agreement to give security may be void, and the debt continue as a legal obligation." The opinion did not affect the debt. Bartle having sought equity should have offered to do, or been compelled to do, equity.

The judgment of the District Court is reversed and the cause remanded with directions to permit the Company, the plaintiff in error, to amend the prayer of its answer in the manner set forth in its motion, and to render judgment in accordance with such prayer.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE TELLER concur.

No. 9963.

KOKOTOVICH v. THE INDUSTRIAL COMMISSION OF COLORADO, ET AL.

Decided February 7, 1921.

Petition under the Workmen's Compensation Act for a lump sum settlement of compensation. Petition denied.

Affirmed.

1. WORKMEN'S COMPENSATION—*Method of Payment.* The method of payment of compensation under the workmen's compensation act rests within the discretion of the industrial commission, and its orders will be set aside by the courts only on the ground that they were procured by fraud, are unsupported by the findings of fact, or beyond its powers.

2. *Lump Sum Settlement.* No fixed rule can be laid down for determining whether weekly compensation or a lump sum should be allowed a claimant under the workmen's compensation act. In most cases, the controlling factors must be the character, capacity and business ability of the claimant.

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3. *Industrial Commission Orders—Review.* In the absence of abuse of discretion by the commission, the court of review may consider only the legal question of whether there is evidence to support the findings.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. B. F. REED, Mr. ROBERT W. STEELE, JR., for plaintiff in error.

Mr. VICTOR E. KEYES, Attorney General, Mr. JOHN S. FINE, Deputy, Mr. FRANK C. WEST, for defendants in error.

Department Three.

MR. JUSTICE BURKE delivered the opinion of the court.

THE Industrial Commission of Colorado, under the provisions of the Workmen's Compensation Act, found plaintiff in error totally and permanently disabled and allowed him the maximum, $8.00 per week for life, therefor. He petitioned for a lump sum settlement in lieu of this allowance. A hearing was had on that petition, testimony taken and the commission found that it was not for his best interests that his petition be granted and ordered accordingly. Such further proceedings were had that the cause was regularly reviewed by the District Court which affirmed the findings and order of the commission. To review that judgment the cause is now before us on error.

The act in question authorizes the commission to order the payment of an award in installments or in a lump sum "as it may determine to be for the best interests of the parties concerned." The method of payment thus rests within the discretion of the commission. The courts are authorized to set aside an order of the commission only on the ground that it was procured by fraud, or is unsupported by the commission's finding of fact, or beyond its power. Sec. 102, Chap. 210, Laws 1919.

There is no contention that the order here complained of was procured by fraud, and it was the proper order to enter on the fact as found. It can only be disturbed, if at all, on

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the ground that it was a gross abuse of discretion, hence in excess of the power of the commission. Plaintiff in error contends that the action of the commission in denying his petition for a lump sum settlement was "arbitrary, unreasonable, unjust and contrary to law and constitutes a gross abuse of discretion." To establish this contention he calls attention to the following facts disclosed by the record: That Kokotovich had a wife and eight minor children all living and wholly dependent upon him for support; that he had no property and no income; that he was unable to perform manual labor of any kind; that he had been reared on a farm and wished to purchase a small farm where he could maintain a home for himself and family and support and educate his children; that he was 33 years old and his expectancy was 33.92 years.

Assuming, but not deciding, that these things may be considered as tending to establish the alleged abuse of discretion on the part of the Commission, the record discloses the further facts that Kokotovich, having been earning from $350 to $450 per month, and having since his injury drawn $34.72 a month compensation, plus $30 a month from some fraternal society to which he belonged, was within fifteen months of the date of the accident, penniless and $1200 in debt. Furthermore that neither plaintiff nor his wife ever conducted a business of any kind of their own.

No fixed rule can be laid down for determining whether weekly compensation or a lump sum should be allowed a claimant under our Workmen's Compensation Act. In most cases the controlling factor must be the character, capacity and business ability of the claimant. In view of the foregoing facts this court cannot say that the commission abused its discretion.

"This court may consider only the legal question of whether there is evidence to support the finding." *Passini v. Industrial Commission,* 64 Colo. 349, 171 Pac. 369.

Finding no error in the record the judgment is affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY concur.

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No. 9958.

DILLIARD v. THE STATE BOARD OF MEDICAL EXAMINERS.

Decided February 7, 1921. Rehearing denied April 4, 1921.

Proceeding to revoke license to practice medicine. License revoked by state medical board, and action sustained by district court.

Affirmed.

1. CERTIORARI—*District Court—Medical Board.* The district court has no power on certiorari, to review the action of the state board of medical examiners in revoking the license of a physician, except for excess of jurisdiction, or abuse of discretion.

2. LEGISLATION—*Physicians and Surgeons.* It is essential that a licensed physician be possessed of professional honor, and the legislature has power to provide for the revocation of a license to practice medicine for unprofessional or dishonorable conduct, though the physician is not shown to be immoral.

3. PHYSICIANS AND SURGEONS—*Statute Construed.* The words "immoral, unprofessional or dishonorable," as used in sec. 11, chap. 94, S. L. 1917, p. 359, concerning the practice of medicine, are sufficiently definite and certain, and the state board of medical examiners has jurisdiction to determine what constitutes unprofessional and dishonorable conduct and to revoke a physician's license on account of such conduct.

4. APPEAL AND ERROR—*Certiorari.* In a review on certiorari, the reviewing court may consider the evidence introduced before the trial tribunal for the purpose only of determining the questions of jurisdiction or abuse of discretion, in the revocation of a license to practice medicine.

Error to the District Court of the City and County of Denver, Hon. Greeley W. Whitford, Judge.

Messrs. MELVILLE, MELVILLE & WALTON, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES H. HAINES, for defendant in error.

En banc.

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MR. JUSTICE DENISON delivered the opinion of the court.

THE Medical Board revoked Dilliard's license to practice medicine; he obtained a writ of certiorari from the District Court and that court affirmed the judgment of the board. Dilliard brings error.

The charge on which the revocation was based was that "Respondent was guilty of unprofessional and dishonorable conduct * * * in that he held out to said Mrs. O. H. Barber that one Charles West * * * was a trained and skilled physician and surgeon and licensed to practice medicine and surgery * * * and caused her to submit to treatment by the said Charles West, * * * whereas West was not a physician and not licensed to practice."

The act under which the proceeding was taken provides for revocation for various reasons, among others for "immoral, unprofessional or dishonorable conduct."

The District Court had no power to review the action of the board except for excess of jurisdiction or abuse of discretion. Code 1908, § 331; S. L. 1917, p. 361, § 11 *ad fin.; Morefield v. Koehn,* 53 Colo. 367, 368, 127 Pac. 234; *Thompson v. State Board,* 59 Colo. 549, 552, 151 Pac. 436.

That the board had jurisdiction of the subject matter of the present case and of the person of the plaintiff in error cannot be questioned. *Thompson v. State Board, supra; Chenoweth v. State Board,* 57 Colo. 74, 141 Pac. 132, 51 L. R. A. (N. S.) 958, Ann. Cas. 1915D, 1188.

The plaintiff in error urges, however, that the legislature has no power to provide for revocation of a license for conduct that is unprofessional or dishonorable unless it is also immoral, and that in charging and convicting Dr. Dilliard with unprofessional and dishonorable conduct only, they therefore were exercising rights which the law could not give them and hence were acting without or in excess of jurisdiction.

We do not think this position is tenable. To say that the legislature cannot constitutionally provide for the revocation of a physician's license for unprofessional or dishonorable conduct involves the premise that he has a constitu-

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tional right to practice unprofessionally and dishonorably. It is essential that a licensed physician be possessed of professional honor. *Chenoweth v. State Board, supra.*

Counsels' most earnest argument, however, is that the expression "unprofessional" is too indefinite and uncertain, that it should be defined by statute, that its definition cannot be delegated to a commission, and so, since the clause "immoral, unprofessional or dishonorable" is in the disjunctive, it is void; and he cites cases which go far enough to support him in his claim. *Ex parte McNulty,* 77 Cal. 170, 19 Pac. 237, 11 Am. St. Rep. 257; *Czarra v. Med. Supervisors,* 25 App. D. C. 443.

With these cases we do not agree, but we agree rather with *State v. State Board,* 34 Minn. 387, 391, 26 N. W. 123, 125; 26 N. W. 123; *State v. State Board,* 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; *Meffert v. State Board,* 66 Kan. 710, 1 L. R. A. (N. S.) 811, 72 Pac. 247, aff. 195 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350; *State Board of Health v. Roy,* 22 R. I. 538, 48 Atl. 802.

The case of the *School of Magnetic Healing v. McAnnulty,* 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, does not reach the point.

It would be hardly consistent or reasonable for this court to say that the terms "unprofessional or dishonorable" were too indefinite to justify the revocation of the license of a physician while we disbar attorneys under R. S. 1908, Sec. 239, for "malconduct in office."

See *Sears-Roebuck & Co. v. Fed. Trade Com.,* 258 Fed. 307, 169 C. C. A. 323, 6 A. L. R. 358, and *National Harness etc., Association v. Fed. Trade Com.,* 268 Fed. 705; decided in December, 1920, U. S. C. C. A., 6th Circuit; *Union Bridge Co. v. U. S.,* 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523.

It is intimated in *Fed. Trade Com. v. Gratz,* 253 U. S. 421, 40 Sup. Ct. 572, 575, 64 L. Ed. 993, that any objection that the power to determine what constitutes "unfair competition" cannot be delegated to a commission is overcome by the fact that the courts have ultimate power to decide that

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question. So here, although the medical board has power to decide in the first instance what constitutes unprofessional conduct, yet if it abuses that power, as counsel fears it will, the courts may review its decision and reverse it.

We must conclude that the words "immoral, unprofessional or dishonorable" are sufficiently definite and that the board has jurisdiction to determine what constitutes unprofessional and dishonorable conduct, and to revoke a license on account of such conduct.

Did the board abuse its discretion?

We do not think so. The evidence tends to show that Dr. Dilliard did what he was accused of, and we cannot consider whether it is sufficient. We can, however, if we are right in the former part of this opinion, determine whether to hold such conduct to be unprofessional and dishonorable is an abuse of discretion. It is evident that it is not. Can there be any doubt that it is an offense against which the public should be protected, and not a mere breach of professional ethics, (*State v. State Board, supra; Chenowith v. State Bd., supra*) to deceive a patient into submission to treatment by one not a physician, by representing him to be such?

It must follow from what has been said of the power of the court to consider abuse of discretion, that it must in some cases consider the evidence in order to determine whether the facts shown come within the proper definition of that term as used in the statute, and consequently, the board, when requested by the respondent, ought, we think, to permit and facilitate the taking of the testimony in shorthand and its incorporation into the record.

In this case we have considered the testimony laid before us as if that had been done.

The judgment of the District Court should be affirmed.

MR. JUSTICE WHITFORD not participating.

On Motion to Modify Opinion and Motion for Rehearing.

The defendant in error moves to modify the opinion; to

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eliminate that portion which suggests review of evidence for abuse of discretion, on the ground that the opinion in this respect is contrary to the well-established law on this subject.

We do not think the position of defendant in error is tenable. Most of the cases he cites were carefully considered before the opinion was written. They are to the effect that the court cannot review the evidence to determine its weight or sufficiency but nowhere is it held that the courts cannot determine from the evidence whether the board has kept within its jurisdiction or abused its discretion. Abuse of discretion stands on the same footing as want of jurisdiction, and we have held that to determine the latter courts may review the evidence, *Thompson v. State Board, supra.* See also *People v. Goodwin,* 5 N. Y. 568.

Code 1908, § 331, was originally the same as that in the old California Practice Act, and did not contain the clause "or greatly abused the discretion" which it now contains. Both before and after the enactment of our code the California Supreme Court construed that act and held that "no act * * * within its jurisdiction can ever be the subject of attack by certiorari. *Buckley v. Superior Court,* 96 Cal. 119, 31 Pac. 8. So, under our code, no act of any tribunal, within its jurisdiction and not greatly abusive of its discretion, however erroneous it may be, can be reversed upon certiorari. Courts can consider the evidence for no purpose except to see whether the board exceeded its jurisdiction or abused its discretion. *People v. Court of Appeals,* 32 Colo. 355, 75 Pac. 921. They may look at the evidence to see whether the facts proved come within the terms of the act, because otherwise they sometimes could not tell whether the court had jurisdiction or had abused discretion, but they can go no further.

An instance of the proper use of evidence in such case appears in *People v. Goodwin, supra.*

Upon motion for rehearing the principal point, which is urged with great force and skill, is that there is no legal evidence that the respondent did the thing charged, and

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that even under Code 1908, Sec. 331, the District Court may review the board's action in such case.

Whatever may be the powers of a district court under such circumstances, in this case we think there was legal evidence to the point, and that therefore that court could not review the board's action as to respondent's guilt.

Motion to modify opinion and motion for rehearing denied.

No. 9976.

McKEE v. THE PEOPLE.

Decided February 7, 1921.

Plaintiff in error was convicted of murder of the first degree.

Reversed.

1. CRIMINAL LAW—*Impeachment of Witnesses.* Impeaching questions must not be upon collateral, irrelevant or immaterial matters. The test of whether a fact inquired of in cross examination is collateral, is: Would the cross examining party be entitled to prove it as a part of his plea? If not, the matter is collateral to the issue.

2. APPEAL AND ERROR—*Evidence—Cross Examination.* In the trial of a criminal case, it was error to permit the district attorney on cross examination of a medical expert, to ask if he had not expressed the opinion to designated persons, that the defendant was guilty, when he had expressed no opinion on the subject on direct examination; it was also error, after he had answered the question in the negative, to permit the prosecution to introduce evidence to show that he had expressed such an opinion out of court.

3. CRIMINAL LAW—*Evidence—Opinion as to Defendant's Guilt, Incompetent.* In the trial of a criminal case, the opinion of no person as to the defendant's guilt, is competent evidence, that being the very matter the jurors are to pass upon.

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Error to the District Court of Yuma County, Hon. L. C. Stephenson, Judge.

Mr. EDWIN H. PARK, Mr. M. M. BULKELEY, for plaintiff in error.

Mr. VICTOR E. KEYES, Attorney General, Mr. CHARLES H. SHERRICK, Assistant, for the People.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error was found guilty of first degree murder upon an information charging him with the murder of his wife, on or about the 5th of April, 1920.

The principal grounds of reversal argued are that the court abused its discretion in permitting evidence as to a wound received by the deceased about February 13, 1920, before evidence was offered to establish a *corpus delicti;* and that it erred in permitting the state, upon cross examination of Dr. Bennett, a witness in behalf of defendant, after asking him whether or not he knew two men by the name of Richards, to put the following question to him. "Q. I will ask you if you did not state to both those gentlemen that after having investigated this case thoroughly you were of the opinion absolutely that the defendant was guilty?" Objection to the question was overruled, and the defendant answered in the negative.

Thereafter, the two persons mentioned were called by the state in rebuttal, and testified that Dr. Bennett had stated to them his belief in defendant's guilt.

Upon direct examination Dr. Bennett had testified that he was a physician and surgeon, and that he had been called upon to examine over one hundred cases of death by violence. In a hypothetical question, based upon the evidence as to the wound of February 13th, he was asked what, in his opinion, would be the after effects of such wound. In another hypothetical question, based upon the evidence as to the condition of the body of the deceased when found, and during some time thereafter, he was asked at what time, in his opinion, the shot had been fired, if it killed the person

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before five o'clock in the afternoon, the time at which the body was discovered. He was then asked some questions in regard to the time that *rigor mortis* might be expected to set in, how long blood would be likely to flow, and how long it would be before the body would become cold, under the conditions shown in evidence.

The witness had made no reference to any findings he had made during his investigation, nor had he given any expression of opinion upon matters other than those above stated.

The question propounded to him, then, could in no sense be used as a basis for impeachment. It was not proper cross examination, and was collateral to the issue. That being so, the state was bound by his denial.

The question of defendant's guilt was the very matter which the jurors were to pass upon, and they were to determine it from evidence of facts and circumstances bearing upon that issue. The opinion of no person as to defendant's guilt was competent evidence. The facts to which Dr. Bennett had testified were proper for the consideration of the jury. They were not such matters as are within the knowledge of people generally, and he was therefore produced as an expert, with special knowledge of the subjects under consideration, to testify concerning them, to enable the jurors to draw proper conclusions from the special circumstances in evidence. Dr. Bennett's opinion as to what conclusions should be drawn from other facts, which could be determined by the jury as well as by himself, was of no consequence, and not proper for the jury to consider.

In *Askew v. The People*, 23 Colo. 446, 48 Pac. 524, the court quotes with approval from Wharton's Criminal Evidence, Sec. 484, as follows:

"The test of whether a fact inquired of in cross-examination is collateral, is this: Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea?"

In Section 1003 Wigmore on Evidence, it is said,

The true test "is that laid down in *Attorney-General v.*

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Hitchcock (1 Exch., 99): Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?"

If it could not, then the matter is collateral to the issue. In this case the evidence did not tend to contradict any statement made by the witness, and related to an expression of opinion which was obviously not admissible. This has several times been announced as the test in such cases.

In *Mitsunaga v. The People*, 54 Colo. 102, at 109, 129 Pac. 241, 244, the court said, referring to questions asserted to have been improper:

"Prior statements of a witness about matters upon which he has not testified in court, cannot be shown. There must be a material inconsistency or contradiction between his evidence in court, and his alleged previous statements out of court, and the impeaching question must not be upon collateral, irrelevant or immaterial matters; but must be upon matters material to the issue. The test as to its materiality is said to be: If the statement which it is alleged the witness made out of court, was true, would the impeaching party be entitled to prove it in support of his case?"

In *Seavy v. Dearborn*, 19 N. H. 351, the court, discussing the latitude allowed in cross examination, said:

"In the first place, it does not extend so far as to authorize a party to prove, by a witness on cross examination, things positively improper to be proved at all; and, secondly, he cannot, for the purpose of discrediting a witness, contradict, by other evidence, his statements that are improper or immaterial. In other words, he may, for the purposes before indicated (i. e., to test a witness' memory, capacity and veracity,) ask questions not strictly relevant to the issue, provided they do not tend to elicit testimony that is injurious or improper."

It is clear that the court erred in overruling the objection to the questions propounded to Dr. Bennett on cross examination, and in permitting the state to introduce testimony to contradict him on that point. These errors were manifestly prejudicial.

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It is further urged that the case should be reversed because during the examination of one witness all persons excepting the jury, the court officers, the defendant and the attorneys engaged in the trial, were excluded from the court room. This was done apparently by the consent of counsel for defendant. They now urge that the right to a public trial is not personal to the defendant; that the public has an interest in the matter, so that the right may not be waived. From the record it does not appear that there was any good reason for this wholesale exclusion, but we do not find it necessary to determine whether or not, under the circumstances named, the defendant has any right to complain. As the judgment must be reversed for the reasons heretofore stated, and the other errors alleged may not be repeated, if they are errors, we need not consider them.

The judgment is reversed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE ALLEN concur.

No. 9418.

PLATT v. WALKER, ET AL.

Decided March 7, 1921.

Action for conversion. Judgment for plaintiffs.

Reversed.

1. PLEADINGS—*Complaint.* In an action for conversion, an allegation in the complaint: That plaintiffs bought from defendants, and the defendants sold and then delivered to plaintiffs the property in controversy, sufficiently alleges ownership and possession in plaintiffs.

2. ACTIONS—*Conversion.* It is immaterial in an action for conversion whether the property be converted innocently or knowingly. The gist of the action is the unauthorized appropriation of one's property.

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3. INSTRUCTIONS—*Conversion—Fraud.* Fraud not being necessary to a recovery of actual damages in an action for conversion, the giving of an instruction to the effect: That if the jury find for plaintiffs, they should fix the damage at such amount as they find from the evidence to be the natural and necessary result of the fraud complained of, is error.

4. FRAUD—*Action.* One who is defrauded in the purchase of property has a right to rescind, or to affirm the contract and recover such damages as he has suffered by the fraud.

5. DAMAGES—*Measure of—Instructions.* In an action for damages, upon whatever theory the cause is tried, it is the duty of the court to instruct the jury as to the measure of damages under such theory.

6. EVIDENCE—*Similar Transactions.* When motive or intent with which an act has been performed is material, evidence of similar acts at or about the same time, is admissible; but the law does not permit proof of other and distinct offenses merely for the purpose of showing that defendant has a criminal disposition or character likely to make him commit the act with which he is charged.

Error to the District Court of the City and County of Denver, Hon. Harry S. Class, Judge.

Mr. ERNEST MORRIS, Mr. A. M. STEVENSON, for plaintiff in error.

MR. JAMES J. SULLIVAN, for defendants in error.

Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANTS in error had judgment in an action against the plaintiff in error for an alleged conversion of certain horses. The parties will hereinafter be designated as in the trial court.

The defendants filed a general demurrer to the complaint which was overruled. Thereupon they filed an answer and the cause proceeded to trial. The jury returned a verdict for $700 actual damages and $3,000 exemplary damages. On motion of the defendants, so much of the verdict as awarded exemplary damages was set aside, and judgment

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was entered for $700 actual damages. At the close of the trial the action was dismissed as to Hollis, one of the defendants.

The complaint alleges: "That on or about September 23, 1916, plaintiffs bought from the defendants and the defendants sold and then delivered to the plaintiffs one hundred and sixteen horses; that upon said sale and delivery, all of said horses were enclosed in a pen or corral in the City and County of Denver" and that thereafter "the defendants wrongfully and unlawfully forcibly broke into and entered said pen or corral and drove therefrom thirty-four of the horses belonging to the plaintiffs, and wrongfully and unlawfully converted the same to their own use."

The complaint further alleges that "for the purposes of deceiving, cheating and defrauding the plaintiffs, the defendants knowingly and maliciously drove or lead thirty-four other horses into said pen or corral" and that the substituted horses were practically of no value whatever.

The complaint further alleges that plaintiffs suffered actual loss of $4500, and that in the wrongful converting of the horses and the substitution of valueless horses, the defendants were guilty of malice, fraud and wilful deceit. The plaintiffs asked for $4500 actual damages, $4000 exemplary damages, and for body execution.

It is objected that the complaint contains no allegation that the horses were the property of, or in the possession of the plaintiffs when the conversion occurred. It having been alleged that the horses were purchased by and delivered to the plaintiffs, under a well known rule, it will be presumed that the condition alleged, that is possession taken by the purchasers, continued.

The case seems to have been tried in part upon the theory that, as charged in the complaint, the defendants had converted to their own use a number of plaintiffs' horses, and in part upon the theory that the action was for damages for fraud in the substitution of worthless horses for horses purchased.

The first paragraph of the complaint, treating it as alleg-

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ing ownership and possession, states a cause of action in conversion. It was unnecessary to go farther and mention the substitution of poor horses for the good ones taken. It is immaterial in an action of conversion whether the property be converted innocently or knowingly. The gist of the action is the unauthorized appropriation of one's property. It would seem in this case that the allegations as to fraud are made with reference to the claim for exemplary damages. Plaintiff Walker testified that as soon as the horses arrived at Grand Island, Nebraska, the point to which they had been shipped, he discovered the presence of the thirty-four defective horses. He made no mention of this, however, to the defendants, from whom thereafter he bought horses largely, and this action was not begun until a little over six months after the alleged conversion. He had, however, within a few days of discovering the alleged fraud, demanded and received from the defendants a rebate of $42 on his purchase price, because of his claim that twenty-one head of the horses bought were not halter broken.

The court instructed the jury at some length as to fraud, stating that, if it be found that the horses were substituted as claimed, the transaction "is a fraud, cheat, deception or circumvention." No instructions were given as to the rule of damages in conversion, but the jury were instructed, over the objection of defendants, as follows:

"The jury are instructed that if you find the issues in this case for the plaintiffs, you shall fix their damage in such amount as you will find from the evidence to be a natural and necessary result of the fraud complained of."

The court further instructed the jury that in case they found damages resulting from the fraud, they might give exemplary damages as well as actual.

This left the jury without any guide as to the determination of the actual damages to be recovered in an action of conversion, which this undoubtedly was.

Fraud not being necessary to a recovery of actual damages on the case presented by the complaint, the fraud, if proved, could not be the basis of recovery. That would be

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to permit the trial court, or plaintiffs' counsel, to abandon the case as stated, and the theory of the right to recover as shown by the complaint, and substitute therefor a different cause of action.

The allegation in the complaint is that the substituted horses were of no value. If that appeared by evidence to be the fact, the plaintiffs' measure of damages was the value of the horses taken at the time they were converted, with interest to the time of trial. This cause presents a question as to what is the legal effect of plaintiffs' failure to return, or offer to return the horses to the vendors.

It is alleged that one hundred sixteen horses were bought, and that thirty-four of those delivered were substitutes. Plaintiff testified that he sold one hundred of them, apparently as of one class. What he received for the others, or what was their value, does not appear. It would seem that in a case like this, a party finding that he had received horses not purchased should at once advise his vendors. The query arises whether or not, if with full knowledge he fails to offer to make return of the horses, he does not affirm the transaction. One who is defrauded in the purchase of property has, as is well known, a right to rescind, or to affirm the contract and recover such damages as he has suffered by the fraud. If he elects to rescind, he must act promptly. If he sues for damages for the fraud he must show that the property purchased under a misrepresentation was of less value than that which he supposed, and had a right to suppose he was getting.

Upon whatever theory the case was tried, it was the duty of the court to instruct the jury as to the measure of damages under such theory. The giving of the instruction quoted was prejudicial error.

A further objection is made to the action of the court in the admission of evidence of what is called a "similar transaction" some six months prior to the alleged conversion. This evidence was admitted upon statement of counsel for plaintiff that he would connect it up in point of time, to

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show that the defendants were engaged in "switching horses."

It is well settled that when the motive or intent with which an act has been performed is material, evidence of similar acts, at or about the same time, is admissible. Subject to this, and perhaps one or two other exceptions, the law does not permit proof of other and distinct offenses; and never merely for the purpose of showing that defendant has a general criminal disposition, or a character likely to make him commit the act with which he is charged. *Shea v. U. S.*, 236 Fed. 97, 149 C. C. A. 307.

In the case cited the parties were charged with a conspiracy to use the United States mails in pursuance of a scheme to defraud. The scheme was to obtain money by a fake horse race. Evidence was admitted of a scheme, participated in by the defendants, at about the same time to defraud by the sale of worthless mining stock. Because of the admission of this evidence, the judgment was reversed; the court holding that the latter matter was of a different nature from that upon which the defendants were on trial, being similar only from the fact that they might be classified generally as confidence games. It was said that the latter scheme had no direct tendency to prove a scheme to defraud through fictitious horse race bets, except as it shows defendants to be of such a character as would render it likely that they might engage in other frauds. The rule is well settled that where such evidence is admissible it must relate to acts so recent as to throw light upon the intent at the time of the commission of the act under consideration. *Butler v. Watkins*, 13 Wall. 456, 20 L. Ed. 629; *Commonwealth v. Robinson*, 146 Mass. 571, 16 N. E. 452.

In Section 377 of Wigmore on Evidence it is said that the principle under which evidence of similar acts is admitted showing habit, plan or system is:

"That the instances must be numerous enough, and that they must have occurred under conditions so similar as to

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indicate a system, plan, or habit of doing that particular thing under similar circumstances."

Applying these principles to the instant case, it appears that the evidence of a so-called similar transaction is wholly inadmissible: First, for the reason that the transaction was too remote in point of time. And, second, it was dissimilar in character.

It was alleged as a cause of action in this case that the defendants had converted plaintiffs' horses by taking out good horses and substituting poor horses therefor. The evidence of a supposed similar instance was to the effect that plaintiff in error had caused one of his employes to take three horses, in the early spring of the year, to his own yard and there change the brands. This was five or six months before the alleged conversion. The defendant was charged not with the rebranding of horses, but the conversion of them.

Moreover, if the testimony of witnesses be accepted that plaintiff in error directed these substitutions to be made, there was no occasion for evidence as to his fraudulent intent; it appears conclusively from the facts, if the stories of the witnesses be true. There are other assignments of error in rulings upon testimony which require no discussion, as on a retrial it is not likely that they will be repeated.

The judgment is reversed.

MR. JUSTICE ALLEN and MR. JUSTICE DENISON concur.

No. 9694.

THE SEVEN LAKES RESERVOIR COMPANY, ET AL. v. MAJORS.

Decided March 7, 1921.

Action for damages to land occasioned by defendants running water through plaintiff's property. Judgment for plaintiff.

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Reversed.

1. ACTIONS—*Limitation.* An action to recover the value of land destroyed and damaged by reason of the use of a natural channel crossing plaintiff's property as a carrier for reservoir water, is a personal action and the six year statute of limitations is applicable thereto.

2. STATUTE OF LIMITATIONS—*When Statute Begins to Run.* In an action to recover for damage to and destruction of land by reason of the use of a natural channel by a reservoir company for carrying water, the statute of limitations began to run when the company commenced using the channel as a carrier, since the land was immediately damaged by such use.

Error to the District Court of Larimer County, Hon. Robert G. Strong, Judge.

Mr. H. N. HAYNES, Mr. WILLIAM V. HODGES, Mr. ROGER H. WOLCOTT, for plaintiffs in error.

Mr. AB. H. ROMANS, Mr. R. W. FLEMING, for defendant in error.

MR. JUSTICE BAILEY delivered the opinion of the court.

The suit is by Sarah T. Majors to recover for the destruction of and damage to her land, occasioned by defendants running a large volume of water into and through Dry Creek, a natural channel which crosses her property. Plaintiff had judgment for $2,750.00, and defendants bring the record here for review on error. The parties are referred to as they appeared below.

In 1906 the Seven Lakes company and one B. D. Sanborn, predecessor in interest of the defendant the Boyd Lake company, began to divert water from the Lake Loveland reservoir through Dry Creek to other of their reservoirs for storage and subsequent irrigation. It is claimed by plaintiff that the conveyance of such water through Dry Creek has cut a deep gulley, with precipitous embankments, which divides her land into two tracts, making them difficult of access, has washed away several acres and injured other land, damaged her irrigation ditch, and generally lessened the value of her property.

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The parties entertain absolutely divergent views respecting their relative rights in the premises. It is contended by plaintiff that, having established her ownership of this channel, and an unlawful entry by defendants, who, as plaintiff claims, had the right of eminent domain, she may recover the value of the land destroyed, and the damages to the residue, any time within twenty years after such entry. The defendants say that the action is in assumpsit, or on the case, and was barred by the six year statute of limitation, as more than that period passed from the time the cause arose to the commencement of the suit.

It is admitted that defendants have used the channel in the manner and for the purpose alleged since 1906. The question to settle is whether, whatever claim plaintiff had was barred by the six year statute, section 4061, R. S. 1908. The portions thereof which have a bearing upon this case are as follows:

"The following actions shall be commenced within six years, next after the cause of action shall accrue, and not afterward: * * *

"Fourth.—All actions of assumpsit, or on the case founded on any contract or liability, express or implied.

"Fifth.—All actions for waste and for trespass upon land."

In *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, the court in discussing the effect of delay in such cases said at page 11, 15 Sup. Ct. 756, at page 758 (69 L. Ed. 873):

"So, too, it has been frequently held that a land owner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages." (Citing cases).

In *Northern Pac. R. Co. v. Smith*, 171 U. S. 260, 18 Sup.

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Ct. 794, 43 L. Ed. 157, the court quotes with approval from *McAulay v. Western Vermont R. Co.*, 33 Vt. 311, 78 Am. Dec. 627, as follows:

"It is certain, according to the English decisions, that he (the landowner) cannot stop the work, and especially the trains upon the road, if he has, in any sense, for the shortest period, clearly given to the company, either by his express consent or by his silence, to understand that he did not intend to object to their proceeding with their construction and operation. * * * If there was then a waiver in fact, either express or implied, by acquiescence in the proceedings of the company, to the extent of not insisting upon payment as a condition precedent, but consenting to let the damages be and remain a mere debt, with or without a lien upon the roadbed, as the law may turn out to be, then it is impossible to regard the defendants in any sense in the light of trespassers or liable in ejectment."

The rule appears to be that actions like the one at bar are based either upon an implied promise to pay, or upon a liability under the constitution, providing that private property shall not be taken or damaged without compensation. *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; *U. S. v. Buffalo Pitts Co.*, 193 Fed. 905, 114 C. C. A. 119; *Snowdon v. Ft. Lyons Canal Co.*, 238 Fed. 495, 151 C. C. A. 431.

This court and our Court of Appeals have repeatedly, either directly or impliedly, held that the six year statute of limitation applies to actions for damages where parties, having the power of eminent domain take possession of land and use it, with the knowledge of the owner, and he neglects to enjoin them, or fails to bring suit for damages within such statutory period, on the implied promise to pay when the facts justify such implication. Such non-action and neglect are held an acquiescence in such entry and use. These cases cover actions for lands taken as well as for consequential damages to lands not taken. *Greeley S. L. & P. R. Co. v. Yount*, 7 Colo. App. 189, 42 Pac. 1023; *U. P. R. R. Co. v. Foley*, 19 Colo. 280, 35 Pac. 542; *U. P. R. R. Co. v.*

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Benson, 19 Colo. 285, 35 Pac. 544; *Middlekamp v. Bessemer Irr. Co.,* 46 Colo. 102, 103 Pac. 280, 23 L. R. A. (N. S.) 795; *Stuart v. Colo. Eastern R. Co.,* 61 Colo. 58, 156 Pac. 152; *Denver & Santa Fe R. Co. v. Hannegan,* 43 Colo. 122, 95 Pac. 343, 16 L. R. A. (N. S.) 874, 127 Am. St. Rep. 100; *Denver & Santa F. R. Co. v. Domke, et al.,* 11 Colo. 247, 17 Pac. 777.

It is contended that this suit is one affecting real estate, under our constitutional provision already referred to, but the object of the suit is clearly the recovery of the value of land destroyed, and for damage to adjacent land, nothing more or less. In the very nature of things it cannot be an action to recover possession of, nor does it in any way affect title to land. In other words, it is a personal action, pure and simple. This is manifest, as defendants had a lawful right, under statutory provision, to use the channel of the stream for the purpose of carrying water, and if, in so doing, they destroyed certain, and injured other, land of plaintiff, an ordinary suit in damage is the natural and logical remedy, subject to the legal rules applicable thereto. The damage was a mere incident to the right the defendants had to so use the channel, and there was no such taking as is contemplated in eminent domain. Even though defendants may have had the right of eminent domain, a question under the circumstances of this case by no means free from doubt, but failed to exercise it, that fact in no way changes their legal liability, or the rights or remedies of the plaintiff. In discussing the effect of the failure of a corporation to exercise the right of eminent domain, it is said in 15 Cyc. 997:

"Statute or charter provisions frequently fix the time within which the owner must move in order to avail himself of the remedy provided by statute for the recovery of compensation, and the date from which, or the event upon the occurrence of which, the limitation begins to run. In the absence of some special statutory provisions applicable thereto, the general statute of limitations applies to proceedings by the owner of the land condemned, and the

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general rule is that, as soon as the construction or operation of the improvement unreasonably abridges the enjoyment of the owner, his cause of action accrues, and the statute begins to run."

The averments of the complaint affirmatively show that the injury complained of did not arise out of an appropriation of land for use by the defendants, but from the erosion and washing away of the banks of the creek and damage to adjacent land by running an unusual volume of water along such channel and through such land. It is in effect precisely the same kind of damage which results from seepage from an irrigating canal. The same rules of law apply to causes of action in the one case as in the other. The action was single, one in which recovery for all damage, past, present and future, could and should have been had. That the six year statute runs against such causes is declared in *Middlekamp v. Bessemer Irr. Co.*, 46 Colo. 103, (103 Pac. 280, 23 L. R. A. [N. S.] 795), where it is said, in the syllabus:

"An action to recover for injuries occasioned to land, by seepage thereto of the waters of a canal, properly constructed under lawful authority, accrues when the lands are first visibly affected and injured. The statute of limitations begins its course from that date. The land owner may recover, in one action, all damages which have been sustained and all prospective damages, to the end of time. After the lapse of six years from the first visible and sensible appearance of the injury the action is barred."

Among the authorities cited in the Middlekamp case, *supra*, are several involving a like injury because of the conveyance of water through land of a plaintiff. One such case is *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, where the city cut a ditch along a street and across the end of Powers' lots, obtaining from him a relinquishment of the right of way. Later, by reason of the enlargement of the ditch and lack of proper protection of the grade the water began to erode the land so that the ditch became forty feet wide and twelve feet deep. The special damage

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began in 1866, but suit was not begun until more than six years thereafter. It was held that the suit involved but a single cause of action, and was barred by the Iowa five year statute of limitation.

The land in question was visibly adversely affected by the introduction of the added flow of water in 1906, and the right of action was a permanent one. Plaintiff continued to have the undisturbed and exclusive possession of the channel for ten or more months each year and at all times enjoyed its use in common with the defendants. The gravamen of the suit is to recover the resultant or consequential damages occasioned by the increased flow of water, as part of a system for conveying it to the reservoirs of defendants. The principles announced in the Middlekamp case as to the bar of the statute are applicable to the facts here.

That this action cannot be maintained on the theory urged by plaintiff is illustrated by the opinion in *Snowdon v. Ft. Lyon Canal Co., supra.* In that case Snowdon, a Pennsylvania citizen, sued the canal company, a Colorado corporation, which without his consent had entered upon his land and thereon constructed a reservoir, not having exercised its right of eminent domain, and without having compensated plaintiff for the land taken. In discussing the remedy, at page 498, the court said:

"We have not been referred to any legislation of the state of Colorado, nor have we been able to find any, which would compel the land owner to proceed under the condemnation statute to recover his damages; and, the complaint having alleged that no proceedings had been instituted by the defendant for the purpose of ascertaining the damages due said plaintiff for the property taken and damaged, the defendant is not at liberty on the present record to claim the benefit of any provision of the condemnation statute. The question then is: May the plaintiff waive the tort, conceding the facts pleaded show a trespass on the part of the defendant, and sue as upon an implied contract for the value of the land?"

The court then proceeds to answer the question in the

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affirmative, citing with approval *U. S. v. Great Falls Mfg. Co., supra,* in support of its ruling; also quoting from *U. S. v. Lynah,* 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539 as follows:

"'It does not appear that the plaintiffs took any action to stop the work done by the government, or protested against it. Their inaction and silence amount to an acquiescence—an assent to the appropriation by the government. In this respect the case is not dissimilar to that of a landowner who, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute in respect to condemnation, is estopped from thereafter maintaining either trespass or ejectment, but is limited to a recovery of compensation';" and continues: "This seems to be the law in Colorado; *Denver & S. F. Ry. v. School District,* 14 Colo. 327, 23 Pac. 978; *Denver & R. G. R. R. Co. v. Doelz,* 49 Colo. 55, 111 Pac. 595; *Edwards v. Roberts,* 26 Colo. App. 538, 144 Pac. 856; *Stuart et al. v. Colo. Eastern R. Co.,* 61 Colo. 58, 156 Pac. 152. It is the rule generally"—(citing cases).

Upon the facts of this case, the opinion in *Strickler v. Midland Ry. Co.,* 125 Ind. 412, 25 N. E. 455, is particularly significant and persuasive. In that case land belonging to plaintiff had been appropriated by the railway company for a right of way, and a track had been constructed thereon. Plaintiff stood by and failed to enjoin the company from proceeding, and also failed to exercise his right to have damages assessed in condemnation proceedings. He did, however, institute an action to recover damages. The Indiana statutes provide that for injuries to property, damages for any detention thereof, and for recovering possession of personal property, the action shall be commenced within six years after the cause of action has accrued. It appears that his action for damages had been commenced after the running of the six year statute of limitation. In discussing this phase of the case, the court, at page 418, said:

"A trespass is a tort, an injury to person or property, and the particular trespass complained of in this case is an in-

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jury to the real property of the appellant, and that portion of the third clause of the foregoing section * * * applies to this class of actions, prosecuted to recover damages for injuries to real property. (Citing authorities). It is well settled that in trespass the statute runs from the time the trespass was committed, and not from the time the full extent of the injury is ascertained." (Citing authorities).

Upon principle and authority plaintiff's right of action accrued when the defendants began the use of Dry Creek, since the land was immediately damaged thereby. The six year limitation statute started to run then. The time limit expired long before the commencement of this suit, and the judgment given, in view of the objection urged that the action was barred, was unwarranted. Our own decisions settle this beyond peradventure, and we need not look elsewhere for authority. Since the action was barred, it is not necessary to discuss or consider other errors assigned.

The judgment is reversed and the cause remanded to the trial court with directions to dismiss it.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE concur.

No. 9724.

THE CHINN LAND & LIVESTOCK CO. v. STEWART.

Decided March 7, 1921.

Proceeding involving the allowance of a claim against the estate of a deceased person. Judgment for claimant.

Affirmed.

1. EVIDENCE—*Book Account.* While documents produced on a hearing may not constitute a proper book account, they may be used by a witness to refresh his memory in testifying to the correctness of a claim against an estate.

2. *Account Stated.* Statements of account sent to a debtor from time to time, though they do not form an account stated, may

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be competent evidence and treated as admissions of their correctness where they are retained beyond a reasonable time for making objection to them.

3. PROBATE LAW—*Amendment of Claim.* On the hearing of a claim against an estate, it was proper to permit an amendment of the claim as to credits and changes in small items of account, where such items were a part of the account in litigation and the amendment did not make a different kind of claim from the one originally presented.

4. EVIDENCE—*Exhibits.* Objections, based upon the form of exhibits which do not appear in the abstract, cannot be considered on review.

Error to the District Court of Delta County, Hon. Thomas J. Black, Judge.

Mr. M. D. VINCENT, Mr. C. T. VINCENT, for plaintiff in error.

Messrs. STEWART & STONE, for defendant in error.

Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiff in error, by stipulation, assumed the defense of a claim filed by defendant in error against the estate of Eliza Chinn, deceased, and on a hearing in the county court, the claimant had judgment. The matter having been appealed to the district court, the claimant again prevailed and the cause is now here on error.

The defendant in the cause offered no evidence. The testimony on the part of the claimant was confined to that of his wife, who was also his bookkeeper. Certain documents were introduced in evidence by him. As counsel correctly state, the question turns on the admissibility of evidence and on the sufficiency of the evidence admitted. There was abundant evidence to support the court's finding, if the same was admissible, and we need not, therefore, consider the first error assigned.

Counsel vigorously contend that the accounts in evidence did not constitute a book-account, and that they were therefore not admissible. That they do not comply with the rule

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as to book-accounts, was conceded by counsel for the claimant and the court did not consider them as forming a book of account.

Claimant's wife, who kept the accounts, testified generally to their correctness, and apparently used them in testifying as memoranda from which to refresh her memory.

Counsel urge also that the statements sent by claimant from time to time to Mrs. Chinn did not form an account stated. This may be so, but the trial court was justified, under the authorities, in treating these statements, when retained by Mrs. Chinn beyond a reasonable time for making objection to them, as admissions by her of their correctness. Courts which adhere to strict rules as to accounts stated, admit accounts, not complying with the rules, as admissions under circumstances such as are above stated. We cannot say that the court erred in admitting them.

It is also objected that the claimant ought not to have been permitted to amend his claim. As the claim, however, does not appear in the abstract, we do not know exactly what it was; but from the evidence as abstracted, it appears, not that the claim as such was amended so as to form a different kind of a claim, but that the estate was, by the testimony of claimant's wife, given a credit which had been overlooked, and a few small items of account were changed. This was entirely proper, as all the items were a part of the account in litigation.

There is considerable discussion by counsel for plaintiff in error of the exhibits, but as they are not in the abstract, we are unable to determine any question which depends upon the form of these exhibits.

On the whole, the court appears to have required the claimant to establish his case by competent evidence, and there being no other questions involved than those above mentioned, we are of the opinion that the judgment should be affirmed, and it is so ordered.

MR. JUSTICE BAILEY sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE concur.

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Finding of Trial Court. A finding of the trial court on conflicting evidence will not be disturbed on review. *McKee v. Elwell*, 316.

Harmless Error. A party cannot complain of an error where the judgment must have been the same if the error had not occurred. *Heaton v. Nelson*, 320.

Instructions—Exceptions. Where a litigant by his counsel states clearly to the court his objections to instructions on a particular point, and offers instructions thereon, to the refusal of which he duly excepts, the question may be presented for review although there were no formal exceptions to the instructions as given. *Ownbey v. Silverstein*, 325.

Finding of Fact. The appellate court will not disturb a finding of fact made upon conflicting evidence. *Rubey v. Clammer*, 329.

Findings and Judgment on Conflicting Evidence. Findings of fact determined on ample, competent testimony and the judgment entered thereon, will not be disturbed on review. *Burgess v. Cole*, 341.

Judgment Supported by Evidence. In a negligence case where there is competent testimony to support the judgment, it will not be disturbed on the ground of insufficient evidence. *Western L. & P. Co. v. Poor*, 380.

Review of Evidence—Industrial Commission. The appellate court cannot review an industrial commission case on the evidence, but where the evidence is undisputed it may be treated as the findings of fact and considered accordingly. *Prouse v. Industrial Com.*, 382.

Writ of Error—Time for. Under rule 16, in force January 22, 1917, limiting the time for issuing writs of error to two years from the entry of judgment, the writ of error in this case was dismissed. *People, ex rel. v. National Co.*, 450.

Refused Instructions. In an action involving an automobile collision at night, where it appeared from the undisputed evidence that plaintiff's car did not carry two headlights, defendant was entitled to an instruction as to the effect upon the case of that circumstance, and the refusal of the court to give such an instruction when requested, was prejudicial error. *Martin v. Carruthers*, 464.

Mistrial. If the court erroneously declares a mistrial and dis-

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charges the jury in a damage case, the error is corrected by the granting of a new trial. *Wagman v. Knorr*, 468.

Verdict on Conflicting Evidence. A verdict based on conflicting evidence will not be disturbed on review. *Id.*

Findings of Fact. Findings of a jury on conflicting evidence will not be disturbed on review. *Jones v. People*, 500.

Moot Questions. It is not the duty of the appellate court to give opinions upon moot questions or to declare rules of law which cannot affect the rights of the parties litigant. *True v. True*, 502.

Sufficiency of Evidence. Where the evidence is sufficient to justify the submission of the case to the jury and to sustain a verdict for plaintiff, the judgment will not be disturbed on review. *Walker v. Blakesley*, 503.

Waiver of Objection. In a proceeding before a juvenile court for the custody of minor children, the objection that the petitioner was a resident of another county, does not go to the jurisdiction of the court. *Hudson v. Mattingley*, 528.

Writ of Error—Right of Municipality. The fact that an act made an offense by municipal ordinance, is also punishable by general statute, does not preclude the city from having an adverse judgment reviewed by an appellate court. *City v. Price*, 535.

Instructions—Exceptions. Error based on instructions will not be considered where the abstract of record contains no exceptions to the giving of such instructions. Rule 7. *Wertz v. Lawrence*, 540.

Verdict. In an action on a promissory note, the defense being payment, where there is testimony tending to support the contentions of both parties, a verdict will not be disturbed on the alleged ground of insufficient evidence. *1st Nat. Bank v. Roberts*, 557.

Right of Trial Judge to Appear. The fact that a petition to a court of review for a writ of certiorari alleges that the trial court removed a receiver without notice to the parties in interest: that the order was arbitrary in character and made without jurisdiction, gives the trial judge no right to appear in the appellate court, either in person or by attorney, to defend his judgment. *Lindsley v. Denver*, 562.

Verdict. A verdict supported by the evidence will not be disturbed on review. *Railway Mail Ass'n. v. Jeffrey*, 569.

Certiorari. In a review on certiorari, the reviewing court may consider the evidence introduced before the trial tribunal for the pupose only of determining the questions of jurisdiction or abuse of discretion, in the revocation of a license to practice medicine. *Dilliard v. State Board*, 575.

Exhibits. Objections, based upon the form of exhibits which do not appear in the abstract, cannot be considered on review. *Chinn Co. v. Stewart*, 598.

ASSAULT AND BATTERY.

Motive—Evidence. Motive is always relevant to the question whether one did what is alleged against him and to the reason why. It is a state of mind. The previous relations of the parties t any transaction may have been sufficient to excite motive and if

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they tend to do so, however faintly, they are relevant. In the admission or rejection of such evidence, something must be left to the discretion of the trial court, the weight and effect being for the jury. *Wagman v. Knorr*, 468.

ATTACHMENT.

Levy on Real Estate—Title. An attachment on land alleged to belong to a judgment debtor, was properly dismissed where the evidence failed to disclose that he ever had legal or equitable title to the premises. *Olson v. Johnson*, 453.

ATTORNEY AND CLIENT.

Disbarment. An attorney who received money for his client, retaining it for about 18 months while denying that he had it, and who made false statements under oath in an investigation concerning the matter, was disbarred. *People, ex rel. v. Humbert*, 188.

Contract. Where attorney and client enter into a contract providing for the payment of attorney fees, the client will be at least liable on *quantum meruit*, if not on the agreement, where he puts it out of the power of the attorney to complete the contract. *Lane v. Gooding*, 216.

Attorney Fees. An attorney who has entered into a contract to perform services for a client in connection with certain litigation, for a specified amount, is entitled to receive additional compensation for services rendered, which are not mentioned in, nor covered by the contract. *Ownbey v. Silverstein*, 325.

Fees—Allowance by Court. A county, not a party to a suit and having no interest in it, cannot be made liable therein for attorney fees by order of the trial court. *Lindsley v. Denver*, 562.

AUTOMOBILES.

Assault and Battery. The law with reference to assault and battery in automobile cases, summarized. *People v. Hopper*, 124.

Violation of City Ordinance. The fact that an automobile driver violated a city ordinance would not alone make him guilty of an assault upon a person injured in a collision between his car and another; but the fact that an ordinance was being violated, is proper evidence going to the question of negligence. *Id.*

Contributory Negligence. It is not the duty of a passenger on the rear seat of an automobile to warn and guide the driver as to his route of travel, speed, etc., and his failure to do so does not constitute contributory negligence. *Hedges v. Mitchell*, 285.

Rules of the Road. A municipal ordinance requiring all vehicles on a circular roadway to drive to the right on entering, constitutes such roadway a "one way street." On such a street, the rule requiring vehicles to drive on the right of the center is inapplicable. *Id.*

Law of the Road. The law of the road requires each of meeting automobiles to turn seasonably to the right. *Martin v. Carruthers*, 464.

Negligence. The fact that one of the parties was at the left of the road, unexplained and unjustified, is conclusive of negligence. *Id.*

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Evidence—Sufficiency in Auto Accident Case. While it is true that the failure of plaintiff to carry two headlights as required by statute, if unexplained or unjustified, was negligence *per se*, nevertheless, a verdict for plaintiff will not be disturbed on that ground if there is room for two opinions under the evidence as to whether such negligence was a contributing cause to the collision. *Id.*

BILLS AND NOTES.

Promissory Note. A promissory note executed and delivered to an indemnity company to secure its policy holders, cannot be surrendered until the last of the policy holders is satisfied in full, and the facts that the policies have been reinsured and that the receiver of the company holds sufficient funds to secure all outstanding policies, cannot avoid this conclusion. *Van Gilder v. Parker*, 196.

Promissory Note. A corporation by resolution of the directors authorized the issuance of 300,000 shares of its capital stock to plaintiff Waldo for which he was to and did pay $7500; the company agreeing to undertake to sell enough of the stock to repay the $7500 with interest. Waldo had full knowledge of the resolution and subsequently became a director of the company. Defendants, who were also directors, executed a promissory note merely to guarantee to Waldo that the proceeds of the sale of stock as provided in the resolution, would be paid to him until he had received the $7500 advanced. Ultimately Waldo declined to carry out the agreement contemplated by the resolution and instituted suit on the note. Defendants had no notice that he had withdrawn from the original agreement. *Held*, that defendants were not liable in the action as brought. *Waldo v. Stevenson*, 273.

Promissory Note—Release of One of Several Makers. The release of one of two or more joint, or joint and several obligors or promisors, operates to release the others. *Whitescarver v. Waldo*, 356.

Acceptance. A general agreement on the part of a drawee to accept bills, is valid. It is not necessary that the agreement refer to a particular bill. *Sigel-Campion Co. v. Davis*, 511.

BONDS.

See INJUNCTION.

Appeal Bond—Presumption. A motion was made to dismiss an appeal on the ground that the bond had not been filed within time. As to whether further time had been asked or granted, the record was silent. *Held*, that the bond having been filed and approved, the appellate court must presume the filing and approval to be regular in all respects in the absence of an affirmative showing to the contrary. *Zollinger v. Valderin*, 39.

Principal and Surety—Liability. Principal and surety are liable on a contractor's bond where the conditions are not met, nor the work contemplated by the contract performed according to its terms. *Colorado Co. v. Nile Dist.*, 366.

Interest—On Amount Due Under Bond. A party is entitled to interest on the amount due under a bond, from the date of notice of default and demand of payment. *Id.*

Criminal Recognizance—Forfeiture. When in a criminal cause, the district attorney agreed that he would consent to or move for a continuance when the case was called for hearing on the day

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fixed for trial, and the defendant in good faith relied upon such agreement and assuming that the matter would be continued, did not appear, it would be inequitable to forfeit his bond. *Southard v. People*, 516.

BROKERS.

Real Estate Brokers—Contract by, to Convey Title. A contract with a real estate broker to sell, confers upon him authority to produce a purchaser able, ready and willing to buy upon terms fixed by the owner, but gives him no power to bind or convey title unless there is a specific written agreement to that effect. *Stark v. Rogers*, 98.

Real Estate Broker—New Deal. Where a real estate broker produced a buyer to whom a sale was made, the fact that the price paid was lower than first suggested does not constitute a new deal brought about solely by the owner, where all the property listed was not included in the deal. *Burgess v. Cole*, 341.

Real Estate Broker—Commission. Where there is no agreement as to the amount to be paid a real estate broker for his services, a reasonable compensation is the rate prevailing among local agents. *Id.*

CERTIORARI.

Question to be Determined. The only question to be determined on a writ of certiorari, is whether the inferior tribunal or board has exceeded its jurisdiction, or greatly abused the discretion allowed it. *State Board v. Boulls*, 361.

Question Involved. In a review on certiorari, the only question to be considered is that of jurisdiction, and whether the trial court acted arbitrarily, or justly and wisely, is wholly immaterial. *Lindsley v. Denver*, 562.

District Court—Medical Board. The district court has no power on certiorari, to review the action of the state board of medical examiners in revoking the license of a physician, except for excess of jurisdiction, or abuse of discretion. *Dilliard v. State Board*, 575.

CHATTEL MORTGAGE.

Sale of Property—Evidence of Value. Evidence of the amount mortgaged property sold for at a private sale in May, 1903, was properly excluded from the consideration of the jury, when offered to prove value of the property as of October 24, 1902, the date of the sale under the mortgage. *Aultman-Taylor Co. v. Forrest*, 53.

Variance. Where plaintiff alleges the amount received at a public sale of property under a chattel mortgage, he will not be permitted to prove the amount obtained at a subsequent private sale which was not pleaded. *Id.*

Record in Foreign State—Removal of Property. A motor truck was purchased in Colorado by a farmer living a few miles across the state line in Nebraska, and to secure the payment of the purchase price, he executed a chattel mortgage on the machine, which was recorded in Nebraska. In the transaction of his business, he drove the truck across the state line into Colorado from time to time. *Held*, that this did not constitute a removal in the sense in which that word is used in the cases on this subject; that the

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mortgage was properly recorded in Nebraska; and that the mortgage lien was superior to those afterwards acquired in Colorado. *Flora v. Julesburg Motor Co.*, 238.

CHILDREN.
See PARENT AND CHILD.

CIVIL SERVICE.
Application of State Law. The state civil service amendment applies only to officers and employes of the state. *People, ex rel. v. Hersey*, 492.

COMMON CARRIERS.
See RAILROADS.

CONSTITUTIONAL LAW.
Title of Act. Where the particular case under consideration is clearly covered by the title, the non-support act must be accepted as valid under sec. 21, art. V of the constitution concerning the title of legislative acts.
The question of whether other portions of the act violate the section, not decided. *Martin v. People*, 60.

Construction. The same principle which requires that two statutes be reconciled if possible, and both given effect, applies in the interpretation of different sections of the constitution. *People, ex rel. v. Higgins*, 79.

Legislative Enactment. Neither an act of the legislature, referred or unreferred, nor an initiated law, can recall any power or privilege granted by the constitution. *City v. Utilities Com.*, 554.

CONTEMPT.
Petition for Recall of Judge. Under Art. XXI of the constitution, which authorizes a recall from office, the circulation of a petition for the recall of a district judge is not contempt of court, where the facts set out in the petition are truthfully stated, though with uncalled for bitterness. Such a petition is privileged. *Marians v. People*, 87.

Constitutional Abridgment. The right to punish as for contempt may be taken from the courts by constitutional provisions. *Id.*

Order of Court—Order of Foreign Court. A valid order entered by a Colorado court must be obeyed and a foreign court cannot affect, vacate or annul it. *DeLaMater v. Graves*, 255.

Order of Court—Relief from. The remedy of a party desiring to be relieved from obeying a court order, is to take formal steps for its vacation, and not to impeach it in contempt proceedings brought to punish a disobedience thereof. *Id.*

CONTINUANCE.
Motion for—Admission as to Evidence. On a motion for continuance by defendant, plaintiff admitted that if an absent witness were present she would testify to the payment of a note at a time alleged in the affidavit filed in support of the motion; on the trial, defendant attempted to prove a different time of payment. *Held*, that where an admission of evidence is obtained based wholly upon an allegation of time and place and the party is surprised on the trial by evidence of another time or place, the judge ought to give

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relief to the party so misled to his injury. *1st Nat. Bank v. Roberts*, 557.

CONTRACTS.

Rescission. In the absence of fraud, courts will not relieve parties from the effects of their speculative ventures or hasty and ill-considered agreements. *Meyer v. Nelson*, 56.

Construction. A contract for the cultivation of land for a share of the crop is a special one, partaking somewhat of the nature of an adventure. It is not a contract of employment. *Pace v. Beckett*, 90.

Breach of Contract. Under a contract for the cropping of land upon shares, the cropper does not become a servant by a breach thereof on the part of the owner of the land and he can not, on account of such breach, maintain an action upon *quantum meruit* for the value of his services. *Id.*

Evidence. In the trial of an action for breach of a cropping contract, it is error to permit the introduction, over objection, of evidence concerning the prevailing rate of wages for work performed by the cropper while carrying out the terms of the contract. *Id.*

Building—Authority of Architect. Where a building contract provides the architect shall determine the "construction and meaning of the drawings and specifications," he is empowered to decide whether drawings or specifications shall govern in case of conflict between them. *Stewart v. Breckenridge*, 108.

Building Contract—Rights of Owner. In the construction of a building under contract, there must be a substantial compliance only, with its terms, and deviations or omissions not due to bad faith, which do not impair the structure as a whole and which can be conveniently remedied, do not justify a claim of non-compliance with the contract. *Id.*

Building Contract—Waiver. Construction of a part of a building which has been approved by the owner or architect, expressly or by implication, is not open to objection by them afterwards, so as to defeat a suit on the contract. *Id.*

Rescission—Burden of Proof. One party to an executory contract, in the absence of fraud or special reason, can not rescind. To rescind by agreement, the agreement must be mutual and by all the necessary parties to the original contract. The burden of proving the agreement is upon the party alleging it. *Adams v. Guiraud*, 112.

Contract of Sale—Essentials. The necessary essentials of a valid contract of sale of cattle are: 1. Certainty as to parties; 2. Sufficient certainty as to property; 3. Price; 4. Time, place and manner of payment; 5. Time and place of delivery, if delivery be agreed upon. *Id.*

Common Carriers—Joint Obligation. A complaint alleged that two companies were associated together with another for transporting freight as common carriers; that plaintiff entered into an agreement with the association which made the act of one, the act of all. *Held*, that a breach of the contract, whether occurring upon one line or the other, is a breach to which both companies

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are parties and is a joint obligation. The fact that the suit might have been brought against the initial carrier is immaterial. *Martin v. Union Pacific R. R. Co.*, 174.

Construed. Where in a rental contract concerning sheep, the renters definitely, unconditionally and unqualifiedly agree to deliver to the owner a specified number of ewes at the end of the term, the fact that a number or all the ewes furnished by the owner perished through no fault of the renters, does not absolve them from their contract. This is true whether the transaction be considered a bailment or not. *Cameron Bros. v. Osborne*, 199.

Breach by Failure to Pay on a Day Stipulated. Failure to pay on a day stipulated in the contract, is not a fatal breach unless time is of the essence of the contract. *Flora v. Glover*, 210.

Time the Essence. The intent to make time of the essence of a contract must be clearly and unmistakably shown. *Id.*

Construction. Where a contract between attorney and client is for legal services pertaining to a *cause of action*, the contract does not limit the services to a trial in the district court, but extends to such as are necessary for securing redress for a violation of the client's rights. *Lane v. Gooding*, 216.

Construction. Where parties, being the lessees of adjoining lands, entered into an agreement for the construction of fences thereon, provisions of the contract for the specific location of fence lines must prevail over any general purpose stated therein. *Tomkins v. Smith*, 271.

Presumptions. It will be presumed that parties stipulating to build a certain amount of fencing, must have intended that the fences were to stand for a reasonable time. *Id.*

Form. A letter which is intended to state the terms of a contract is conclusive of the matters which it covers and the parties are bound by its terms. *Ownbey v. Silverstein*, 325.

It is error for a trial court to leave to the jury the matter of determining what the terms of an express contract are, instead of directing them to the terms of a letter covering the matters involved, which is conclusive upon the parties. *Id.*

Part Performance—Statute of Frauds. The part performance, which will bring a contract within the provisions of sec. 2664 R. S. 1908 concerning the power of courts of equity to enforce specific performance, must consist of an act or of acts which it clearly appears the performing party would not have done in the absence of the agreement or without a direct view to its performance. *Brown v. Johanson*, 400.

Parol Evidence. Parol evidence of the circumstances surrounding the making of a written contract may be considered when the intent of the parties making the contract is not clear from its terms. *Schmelzer v. Condit*, 405.

Construction. Written proposition for the sale of mining property, acceptance, commission contract and receipt, examined and held to constitute an option only. *Id.*

Parol Evidence. In the absence of evidence of mutual mistake, fraud or misrepresentation, parol testimony is inadmissible to vary the terms of unambiguous written contracts, and they are

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to be construed according to the intention of the parties as therein expressed. *Antero Co. v. Lowe*, 409.

Public Policy. Public policy requires that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and enforced by the courts. *Id.*

Contract for Sale of Reservoir Rights—Construction. Under a clause in a contract for the sale of storage reservoir rights, providing that the system should on a certain date be turned over to a company to be organized by the subscribers to the rights, the property did not pass *ipso facto* to the contract holders immediately on the date mentioned, there being no company organized to take it over. *Id.*

Specific Performance. Specific performance is not a matter of right, but of grace, and a court of equity will not be swift to enforce specific performance of a contract that has been allowed to expire by lapse of time and that has been defaulted and forfeited. *Id.*

Specific Performance—Mutuality. An action for specific performance of a contract for the construction of an irrigation system cannot be maintained unless plaintiff could be compelled in a court of equity at suit of the defendant, to perform it on his part. The remedy must be mutual. *Id.*

Agreement to Accept Draft. At plaintiff's request, a bank telegraphed defendant, "Are you honoring Jack Goldberg's checks for cattle?" Defendant replied, "Yes, when cattle consigned to us." Plaintiff then delivered his cattle, which were consigned to defendant, Goldberg giving him a draft on defendant for the amount due. *Held*, that the transaction constituted a valid contract on the part of defendant to honor the draft when presented; Also, that the bank in making the inquiry was plaintff's agent, and he an undisclosed principal who could take the benefit of the contract. *Sigel-Campion Co. v. Davis*, 511.

CONTRIBUTION.

Sureties on Promissory Note. A surety who claims contribution because he has paid the common obligation, can not recover against the co-surety if the payment so made was under and in consideration of an independent agreement between the principal and surety so paying. *Durango Trust Co. v. Campbell*, 49.

CORPORATIONS.

Chargeable with Knowledge of Directors. A corporation is chargeable with knowledge of its organizers, who also constitute a majority of its board of directors, concerning the invalidity of a deed through which it acquires title to property. *Treat v. Schmidt*, 190.

Effect of Dissolution on Previous Liabilities. The dissolution does not affect remedies against the corporation. *Dutton Hotel Co. v. Fitzpatrick*, 229.

COUNTIES.

Liability for Tort of Agent. A county is not liable for the tort of its agents in the absence of an express statute making it liable. *County Commissioners v. Adler*, 290.

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Damages—Liability of County—Action. One whose property is damaged by the construction of a public improvement by a county may bring an action for damages therefor, and this is true where the improvement is constructed without condemnation proceedings. *Id.*

In this respect he is not limited to the cases in which he had a right of action at common law; but may sue for damages suffered, though there is no question of negligence involved. *Id.*

COURTS.

Jurisdiction. Courts have original inherent jurisdiction over charitable gifts and trusts. *Hagin v. International Trust Co.*, 135.

Jurisdiction—Domicile. Where it appeared that a family had established a residence in Colorado, the fact that the husband with the children left that state for Missouri after being served with process in a suit for separate maintenance by the wife, would not divest the Colorado court of jurisdiction.

The question of residence is for the trial court, if it be necessary, to determine jurisdiction.

Every sovereignty exercises the right to determine the status of persons found within its jurisdiction, and if defendant's domicile had in fact been in Missouri, the court did not err in assuming jurisdiction of the cause. *Badger v. Badger*, 564.

CRIMINAL LAW.

See INTOXICATING LIQUORS.

Nonsupport Act—Validity of. The power granted to courts by the nonsupport act, to suspend sentence upon the giving of a bond, is not in conflict with the constitutional requirement for sentence in felony cases; neither is it an infringement upon the pardoning power of the Governor. *Martin v. People*, 60.

Chap. 179, S. L. 1911, providing for imprisonment of men who fail to support their wives and children, does not violate sec. 12, art. II of the constitution prohibiting imprisonment for debt. *Id.*

Title of Act. Where the particular case under consideration is clearly covered by the title, the non-support act must be accepted as valid under sec. 21, art. V of the constitution concerning the title of legislative acts.

The question of whether other portions of the act violate the section, not decided. *Id.*

Harmless Error. Evidence of the killing of another person than the one charged in the information, is not prejudicial where it tends to show that such other person was not killed by defendant but by his companion. *Pearson v. People*, 76.

Confession. Upon the issue of whether a statement or confession made by one charged with a criminal act, is voluntary or involuntary, the finding of the trial court will not be disturbed where it is fully supported by the evidence. *Id.*

Evidence—Res Gestae. Evidence of the circumstances surrounding the arrest of one charged with a criminal act is admissible as a part of the *res gestae*. *Id.*

Instructions. An instruction not justified by the evidence is properly refused. *Id.*

Intent—Directed Verdict. A verdict of not guilty is properly di-

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rected under an information charging an assault with intent to commit a bodily injury, where the evidence shows no specific intent to commit such an assault; intent being an essential element of the crime. *People v. Hopper*, 124.

Assault to do Bodily Harm—Included Offense. Under a charge of aggravated assault, the jury may find that the assault was committed without the aggravated circumstances, and return a verdict of guilty of simple assault. *Id.*

Automobiles—Assault and Battery. The law with reference to assault and battery in automobile cases, summarized. *Id.*

Information—Assault and Battery. A person can not be convicted of a battery under an information alleging an assault only, no battery being charged. *Id.*

Trial—Question for the Jury. In the trial of a criminal case under an information charging assault to commit bodily harm, where there is some evidence of such negligence as might make the defendant guilty of simple assault, that question should be submitted to the jury, notwithstanding there could be no conviction of the major offense, owing to the absence of proof of intent. *Id.*

Confession of Error by Attorney General. Where the prosecution, acting through the Attorney General, confesses error and asks for a reversal of the judgment, it is not incumbent upon the appellate court to investigate the record and determine the correctness of his conclusions. *Richardson v. People*, 155.

Intoxicating Liquors—Instigation of Crime by State Officials or Witnesses. On a review of the evidence it is held that there was no such entrapment or instigation as to prevent the defendant's acts in keeping, offering for sale and selling intoxicating liquors, from being criminal. *Plue v. People*, 250.

Statutory Construction. If a statute is capable of more than one construction, that should prevail which operates in favor of liberty. *In re Blocker*, 259.

Penitentiary Sentence—Deductions for Good Conduct—Computation. Under sec. 4871, R. S. 1908, concerning deduction of time from penitentiary sentences for good conduct, 11 months service constitutes the first year, 10 months the second year, etc., and after the 5th year each 6 months service counts as one year. *Id.*

Right to Bail After Conviction and Before Sentence. Section 19 of the Bill of Rights, relating to bail, does not give a defendant an absolute right to bail after conviction and before sentence, this being a matter within the discretion of the trial court. *Romeo v. Downer*, 281.

Burglary and Larceny. Where an information charges both burglary and larceny, there may be a conviction of burglary only. *Collins v. People*, 343.

Burglary—Ownership of Property. In a criminal trial where it is shown by the people's evidence that the property burglarized was the home of the two persons alleged in the information to be the owners, it is immaterial who held the legal title, and it was not error to exclude testimony offered for the purpose of proving title. *Id.*

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Information—Verification. An affidavit attached to a criminal information, which recites that affiant "has read the foregoing information and knows the contents thereof and that the facts stated therein are true of his own personal knowledge," is sufficient. *Id.*

Possession of Recently Stolen Goods. Proof that a burglary was committed, that goods were then and there stolen and shortly thereafter found in the possession of the accused, will sustain a conviction. *Id.*

Evidence—Offense Charged to Another than Defendant. It is not admissible to show that another person has been informed against for the offense with which the defendant is charged. *Id.*

Information—Amendment During Trial. Amendments of informations in matters of substance cannot be made at the trial, but amendments in matters of form are allowable. *Collins v. People*, 353.

Amendments changing the name or description of the owner of property in a charge of larceny are amendments in a matter of form and allowable during the trial. *Id.*

Amended Information—Rearraignment and Reverification. It is not necessary to rearraign the defendant nor to have the information reverified after allowable amendment during the trial. *Id.*

Rape—Uncorroborated Testimony of Prosecutrix. The fact alone, that a conviction of statutory rape rests upon the uncorroborated testimony of the prosecuting witness, is insufficient to require a reversal. *Jones v. People*, 500.

Proof of Venue. Venue in a criminal case need not be proven by direct evidence. *Id.*

Impeachment of Witnesses. Impeaching questions must not be upon collateral, irrelevant or immaterial matters.

The test of whether a fact inquired of in cross examination is collateral, is: Would the cross examining party be entitled to prove it as a part of his plea? If not, the matter is collateral to the issue. *McKee v. People*, 580.

Evidence—Cross Examination. In the trial of a criminal case, it was error to permit the district attorney on cross examination of a medical expert, to ask if he had not expressed the opinion to designated persons, that the defendant was guilty, when he had expressed no opinion on the subject on direct examination; it was also error, after he had answered the question in the negative, to permit the prosecution to introduce evidence to show that he had expressed such an opinion out of court. *Id.*

Evidence—Opinion as to Defendant's Guilt, Incompetent. In the trial of a criminal case, the opinion of no person as to the defendant's guilt, is competent evidence, that being the very matter the jurors are to pass upon. *Id.*

DAMAGES.

Pleading. Alleged damages for the loss of the use of a pleasure automobile, being special in character, must be pleaded. *Hunter v. Quaintance*, 28.

Release—Fraud. Where a person sustaining personal injuries alleged to have been caused by the negligence of a railroad company, gives a full release and settlement for a valuable considera-

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tion, he has no cause of action unless the release is vitiated by fraud in obtaining it. *D. & R. G. R. R. Co. v. Ptolemy*, 69.

Negligence—Pleading—Instructions. In an action for personal injuries alleged to have been occasioned by a broken electric wire, an allegation in the complaint to the effect, that defendant was negligent in permitting the wire to remain in contact with the limb of a tree thereby becoming worn, abraded and burned in two and falling on and remaining across a public highway, is sufficient to justify an instruction that the jury might find the defendant guilty of negligence irrespective of the cause of the break, if it knew, or by the exercise of the utmost care, should have known that the wire was down. *Western L. & P. Co. v. Poor*, 380.

Exemplary—Instructions. It is error to charge a jury on the question of exemplary damages when there is absolutely no evidence in the record upon which to base such an instruction. *Id.*

Measure of—Instructions. In an action for damages, upon whatever theory the cause is tried, it is the duty of the court to instruct the jury as to the measure of damages under such theory. *Platt v. Walker*, 584.

DEEDS.
See REAL PROPERTY.

DIVORCE AND ALIMONY.
Alimony—Payment—Presumption. The appellate court will presume that an order of the trial court for the payment of costs and attorney fees will be obeyed after the denial of a supersedeas. *True v. True*, 502.

EJECTMENT.
Termination of Lease—Action for Rent. A suit in ejectment by a landlord against a lessee is an irrevocable election to declare the lease terminated. A suit, for rent which accrues subsequent to such termination, cannot be maintained and the receipt of rent after suit is instituted does not revoke the forfeiture. *Perry v. White*, 234.

ELECTIONS.
Certificate of Nomination—Filing. Under the provisions of sec. 26, Ch. 4, S. L. 1910, providing that a certificate of nomination for an office to be filed by the voters of a district greater than a county shall be filed with the secretary of state, a certificate of nomination for the office of district attorney of the second judicial district should be filed with the secretary of state, notwithstanding the boundaries of the district were coincident with those of the county. *Brown v. Van Cise*, 242.

EMINENT DOMAIN.
Compensation. Not only does the constitution guarantee the right of a person, whose property is taken for public use, to receive compensation therefor, but the right exists regardless of constitutional provisions. *C., B. & Q. R. R. Co. v. Utilities Com.*, 275.

Police Power and Right of Eminent Domain Distinguished. A railroad crossing may be ordered put in under the police power of the state; but land may be taken for a street only by the exercise of the right of eminent domain. *Id.*

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EQUITY.

Trial—Verdict of Jury. In the trial of an equity case, the verdict of a jury is only advisory to the court, and error can not be assigned on instructions given or refused. *Stewart v. Breckenridge*, 108.

Specific Performance of Contracts. Conceding a breach of the contract, a court of equity may grant relief when such relief appears to be in accord with the intent of the parties when the contract was made. *Flora v. Glover*, 210.

In equity, no man can take advantage of his own wrong. *Rogers v. Bruce*, 298.

Restoration of Legal Rights. When legal rights of parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new right acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons. *Lawson v. Whitley*, 346.

EVIDENCE.

Admission without Objection. Counsel are officers of the court, charged with the duty of guarding it against errors at the trial, and when they acquiesce in the admission of evidence may not, after verdict, claim it was improperly received. *Colorado Springs Co. v. Reese*, 1.

In the trial of an action for breach of a cropping contract, it is error to permit the introduction over objection, of evidence concerning the prevailing rate of wages for work performed by the cropper while carrying out the terms of the contract. *Pace v. Beckett*, 90.

Presumptions. Parties are presumed to know the law and neglect, discourtesy or inefficiency on the part of the Industrial Commission, if there be such, cannot relieve them of this presumption nor from the necessity of complying with the statute. *Midget C. G. M. Co. v. Industrial Com.*, 218.

Presumptions—Instructions. The court will not take judicial notice of the existence of a foot rail in an automobile so constructed as to permit passengers to entangle their legs therein, and where there is no sufficient proof on the subject, a specific instruction relating thereto is not required. *Hedges v. Mitchell*, 285.

Inconsistent with Admitted Facts. The conclusion of a witness which is so at variance with admitted facts as to be incongruous, should receive no consideration. *Killian v. McCourt*, 455.

Similar Transactions. When motive or intent with which an act has been performed is material, evidence of similar acts at or about the same time, is admissible; but the law does not permit proof of other and distinct offenses merely for the purpose of showing that defendant has a criminal disposition or character likely to make him commit the act with which he is charged. *Platt v. Walker*, 584.

Book Account. While documents produced on a hearing may not constitute a proper book account, they may be used by a witness to refresh his memory in testifying to the correctness of a claim against an estate. *Chinn Co. v. Stewart*, 598.

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Account Stated. Statements of account sent to a debtor from time to time, though they do not form an account stated, may be competent evidence and treated as admissions of their correctness where they are retained beyond a reasonable time for making objection to them. *Id.*

EXECUTION.

Levy on Money. Money may be levied upon under a writ of execution and shall be returned by the officer making such levy as so much money collected without sale. *McMillen v. Yost*, 462.

EXECUTORS AND ADMINISTRATORS.

See PROBATE LAW.

FEES.

Clerk's Docket Fee. Under sec. 1538, R. S. 1908, a case may be docketed on appeal without payment of clerk's fees in advance if the clerk shall waive advance payment or agree to accept it at some future time.

Sec. 2528 R. S. 1908, providing for the payment of clerk's fees in advance, is permissive only and not mandatory. *Wigton v. Wigton*, 19.

FRAUD.

Proof. To prove fraud in obtaining a release of a claim for personal injuries, the evidence must be clear, precise and indubitable. The burden of making this proof is on the plaintiff. *D. & R. G. R. R. Co. v. Ptolemy*, 69.

Fraudulent Misrepresentations. A railroad company's physician who stated "as his opinion" plaintiff's injuries were not serious, was not guilty of false misrepresentations. If plaintiff was in fact suffering from internal injuries which the physician failed to discover, such failure might indicate negligence on his part. *Id.*

Conveyance of Property. The transfer of all one's property to secure support for the remainder of grantor's life, is fraudulent as against his existing creditors. *Regan v. Turner*, 194.

Burden of Proof. The burden of proving fraud is upon the party alleging it. *Mathews v. Mathews*, 333.

Frauds—Statute of—Debt of Another. Where one, to promote his own interest, promises to pay the debt of another, the transaction constitutes an original contract, and is not within the statute of frauds. *Moon v. Greenlee*, 482.

Action. One who is defrauded in the purchase of property has a right to rescind, or to affirm the contract and recover such damages as he has suffered by the fraud. *Platt v. Walker*, 584.

HEIRS.

Widow. The contention that a widow is not an heir of her deceased husband is contrary to the holding of the court in *Anderson v. Groesbeck*, 26 Colo. 3. *Binkley v. Switzer*, 176.

HUSBAND AND WIFE.

Fraudulent Conveyance. Where a husband disposes of his property in trust for the use of another, for the purpose of defeating the rights of his wife, reserving to himself a life interest, the transaction is a fraud upon the wife from which she may be relieved after his death. *Grover v. Clover, Adm'r.*, 72.

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Contract Concerning Property Rights. An oral contract was entered into between a husband and wife before their marriage wherein it was agreed that their property rights should not be affected by the marriage. Subsequent to their marriage they executed a written agreement in which each waived and released all right to the property of the other. The husband left a will in which no provision was made for the widow and she attempted to repudiate the contract, claiming one-half of his estate under the statute for the alleged reasons that the oral contract was void within the statute of frauds and that the written agreement was ineffectual for want of consideration. Both contentions are resolved against the widow, the court holding that her violation of the solemn contract was a manifestation of bad faith and ought not to be tolerated. *Remington v. Remington*, 206.

Separate Maintenance. In an action by a wife for separate maintenance, evidence to the effect that her husband left her for many months, during which period he only gave her $35, justified an order that he contribute to her support. *Badger v. Badger*, 564.

Separate Maintenance. Evidence of the wife's need of support and of the husband's ability to provide it is all that is required to authorize an order for her maintenance. *Id.*

INDUSTRIAL COMMISSION.

See WORKMEN'S COMPENSATION.

INITIATIVE AND REFERENDUM.

Submission Clause. Under secs 1 and 3, laws of 1919, p. 431, to the effect that an initiative petition shall contain a "submission clause" before being signed by electors, a petition which contains a ballot title together with the words "yes" and "no" and blank spaces opposite thereto, may be deemed to comply with the requirements of the Act concerning submission clauses. *Noland v. Hayward*, 181.

INJUNCTION.

Restraining Order—Bond. Where the showing was ample to support the issuance of a temporary restraining order under sec. 164 of the code, a motion for judgment on the bond executed pursuant to the provisions of the section was properly denied, notwithstanding the restraining order was eventually set aside and vacated. *Staley v. Klett*, 339.

Bond—Signature of Principal. Under secs. 163 and 172 of the Colorado code, relative to injunction bonds, failure of the principal to sign such bond does not render it invalid. *Esselstyn v. U. S. G. Corporation*, 547.

Bond Executed After Issuance of Writ. It is immaterial whether an injunction bond is given before or after the issuance of the writ, where the purpose and effect in the interest of the plaintiff in the suit is undisputed. *Id.*

Bond—Approval by Clerk—Presumption. In the absence of a showing that the clerk was without authority to approve injunction bonds, it may be assumed that such approval was regular and authorized. *Id.*

Injunction Bonds—Action on—Elements of Damage. If the injunctive relief sought is ancillary merely, expenditures made upon

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the main case cannot be properly claimed as damages in a suit on the bond. On the other hand, if it is impossible to dissolve the injunction without a hearing upon the merits, all expenses connected with such trial, including attorney fees, are proper elements of damage. *Id.*

INSTRUCTIONS.

Issues. Instructions should confine the issues to the facts in the case, and should not contain conclusions or asumptions not warranted by the evidence. *Adams v. Guiraud*, 112.

Conversion—Fraud. Fraud not being necessary to a recovery of actual damages in an action for conversion, the giving of an instruction to the effect: That if the jury find for plaintiffs, they should fix the damage at such amount as they find from the evidence to be the natural and necessary result of the fraud complained of, is error. *Platt v. Walker*, 584.

INSURANCE.

Fraternal Benefit Society Certificate—Waiver of Notice. When the insurer says nothing of breach of the condition as to notice, and furnishes blanks for proof of death, etc., the claimant under a policy is entitled to infer that the question of payment is to be determined on its merits. *Boaz v. Commercial Travelers of America*, 44.

Insurance Policy—Construction. Having indemnity for its object, a policy of insurance is to be construed liberally to that end, and for this reason conditions and provisos therein will be strictly construed against the insurer. *Id.*

Waiver of notice—Evidence. In an action on a life insurance policy, evidence of waiver of notice is to be regarded in a light as favorable to plaintiff as is reasonable. *Id.*

INTOXICATING LIQUORS.

See CRIMINAL LAW.

Instructions. In a prosecution by a municipality under an ordinance prohibiting the sale of intoxicating liquors, a sale being proven, it was error for the court to instruct the jury to the effect, that in order to find defendant guilty, it must appear that he had reason to believe that the liquor sold was to be used as a beverage for the purposes of intoxication, and not as a medicine. *City v. Price*, 535.

Medicinal Purposes—Good Faith. One who sells intoxicants cannot defend his action on the ground of good faith, by claiming the sale was for medicinal purposes, when he had made no attempt to comply with the provisions of law permitting such sales. *Id.*

Evidence—Sales by Other Persons. Evidence of sales of liquor of the same kind by other persons, who were not prosecuted therefor, is inadmissible in a prosecution for the sale of intoxicating liquor. *Id.*

IRRIGATION.

Ditch Right of Way. Where a ditch owner is permitted without interference to construct a ditch over the land of another and the ditch is put in use, a right of way is thereby acquired and the necessity for condemning to obtain possession is obviated. *Fearnley v. Haines*, 41.

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IRRIGATION DISTRICTS.

Contracts. Section 11, chap. 113, S. L. 1905, relative to the authorization and ratification of irrigation district contracts by electors of the district, applies to modifications of, as well as to original contracts, and a modification of an executed contract involving a consideration in excess of twenty-five thousand dollars, without such authority and ratification, renders the contract void. *Colorado Co. v. Nile Dist.*, 366.

Void Contract—Acceptance of Work Under. Acceptance of work by an irrigation district board under a void contract, is without effect. *Id.*

Contracts—Power of Board. Where the electors of an irrigation district vote to purchase an irrigation system to be completed according to certain plans and specifications prepared by an engineer, the district board is without power to authorize material changes in the plans and any contract entered into by the members thereof materially changing the system from that authorized by the electors, is illegal. *Antero Co. v. Lowe*, 409.

Action by Tax Payer. In the absence of fraud, a taxpayer of an irrigation district has no capacity to bring an action for the district against the will, discretion and judgment of the district board in whom is vested by statute the power and authority to exercise such judgment.

Discretion exercised by the proper authorities, unless abused, cannot be reviewed by the courts at the instance of a taxpayer. *Id.*

JOINT ADVENTURERS.

Fair Dealing. Each of several joint adventurers owes to the others absolute good faith, open and honorable dealing, free from deception and concealment. *Moe v. Lowry*, 371.

Secret Profit. In the case of a secret profit by a joint adventurer, he must disgorge all that he surreptitiously acquired. *Id.*

Accounting for Profits. One of several joint adventurers who secretly receives back all that he has invested in the enterprise, is left without any interest in the joint adventure and is not entitled to share in the profits or property pertaining thereto. *Id.*

JUDGMENTS.

Res Judicata. Plaintiff obtained judgment against defendant in Virginia, upon which another judgment was granted in the District of Columbia. In an action upon the latter judgment, upon review, *held*, that the question of jurisdiction of the Virginia court, having been litigated and determined by the District of Columbia court, which admittedly had jurisdiction, could not again be tried. *Degge v. Baxter*, 122.

Foreign State. The judgment of a foreign state having jurisdiction, in the absence of fraud, is entitled to full faith and credit in the courts of this state. *Id.*

Service of Summons. The return on a summons shown in evidence was to the effect that the parties held to be in default were not found. It was contended that a judgment against them was void for want of jurisdiction of the person. *Held*, that where a part of the record only, was in evidence, the record withheld might contain evidence of service and the general presumption in favor of the judgment must prevail. *Binkley v. Switzer*, 176.

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Void—Collateral Attack. Judgments rendered upon matters not presented for litigation by the pleadings are void and subject to collateral attack. *Id.*

Judgment non obstante veredicto. The defense in this case being insufficient in law, a verdict for defendants based thereon, is upon immaterial issues and a judgment *non obstante veredicto* is proper. *Cameron Bros. v. Osborne*, 199.

Injunction Against the Enforcement of. In order to enjoin the enforcement of a judgment at law on the ground that it is unconscionable and inequitable, the complaining party must show facts which prove it to be against conscience to execute such judgment and of which he could not have availed himself at law, but was prevented by fraud or accident, unmixed with any fraud or negligence in himself or his agents. *Rogers v. Bruce*, 298.

Revival—Parties. If a judgment creditor seeks by *scire facias* to keep a judgment in force, then he must proceed against *all* the defendants, and revive the specific judgment. If he desires to proceed against one only of the defendants, his remedy is by a new action in debt on the judgment. *Allen v. Patterson*, 302.

On Issue Not Pleaded. A litigant having tried a cause on a theory which is in accord with his pleadings, cannot sustain a verdict on evidence competent only under an entirely different theory. *Minneapolis Steel Co. v. Yeggy*, 313.

Body Execution—Money of Defendant in Possession of Officer—Procedure. Where a defendant is taken into custody by the sheriff under a body judgment and he turns over to the officer for safe keeping money then in his possession, the proper procedure by the judgment creditor to secure the application of such money to the payment of his judgment is by motion, which is a proceeding in the action. *McMillen v. Yost*, 462.

Body Execution. Where an agent appropriated money belonging to his principal, an action for conversion was held to be clearly one founded on tort within the meaning of section 3024 R. S. 1908, authorizing a body execution. *Ferguson v. Turner*, 504.

JUVENILE COURTS.

Jurisdiction. Juvenile courts have jurisdiction in cases involving non-support of minor children. *Martin v. People*, 60.

Power—Order on Conflicting Evidence Conclusive. The power of a juvenile court in matters involving the custody of minor children, is great, and while it should be exerted with the utmost circumspection, an order based upon conflicting evidence will not be disturbed on review. *Hudson v. Mattingley*, 528.

LANDLORD AND TENANT.

Action for Mesne Profits or Damages. The remedy open to a landlord for rent of premises after termination of a lease is an action for mesne profits or damages.

While these might be recovered under code chap. 23, they cannot be in an action of forcible entry. *Perry v. White*, 234.

Receipt of Rent—Waiver of Forfeiture. If a landlord by mistake of fact or law, demands and has judgment for more rent than he is entitled to receive, he does not by that alone waive the forfeiture, to enforce which was the very purpose of his suit. *Id.*

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LAST CLEAR CHANCE.
See NEGLIGENCE.

LEGISLATION.
Physicians and Surgeons. It is essential that a licensed physician be possessed of professional honor, and the legislature has power to provide for the revocation of a license to practice medicine for unprofessional or dishonorable conduct, though the physician is not shown to be immoral. *Dilliard v. State Board*, 575.

LIENS.
Mechanic's Lien—Action to Foreclose—Parties. Under sec. 4035 R. S. 1908, specifying who shall be made parties in an action to foreclose a mechanic's lien, all persons claiming of record any interest in the premises must be made parties, notwithstanding some of them may have acquired their interest subsequent to the time the lien attached. *Hawkins v. Grisham*, 156.

LIMITATIONS.
Conversion—When Statute Begins to Run. In a suit by a guest against a landlord for conversion of baggage, the action did not accrue until demand, the refusal of which constituted conversion, at which time the statute of limitations began to run. *Dutton Hotel Co. v. Fitzpatrick*, 229.

Fraud and Mistake. Whatever statute of limitations applies to a case of fraud or mistake, it does not begin to run in equity, until after the discovery of the fraud or mistake. *Thomas v. Thomas*, 282.

When Statute Begins to Run. In an action to recover for damage to and destruction of land by reason of the use of a natural channel by a reservoir company for carrying water, the statute of limitations began to run when the company commenced using the channel as a carrier, since the land was immediately damaged by such use. *Seven Lakes Res. Co. v. Majors*, 590.

LIVESTOCK.
See RAILROADS.

Stock Killing Statute Construed. Under chapter 135, S. L. 1911, relative to killing of stock by railroads, the owner of stock killed is bound by the procedure therein established only when the railroad company complies with its provisions, and if the company fails in this respect, the owner may bring an action under secs. 1, 2, 3 and 4 of the act to recover the actual value of the animals killed. *Chicago, R. I. & P. Ry. Co. v. Eyster*, 168.
Failure of a railroad company to maintain a fence as required by the act, is negligence *per se*, and if such negligence is the cause of the accidental killing of stock, the owner may recover. *Id.*

MALICIOUS PROSECUTION.
Malice. In a case of malicious prosecution, malice is an essential element of the cause of action, and a finding of the jury that defendants were not actuated by malice is decisive of the case. *Warner v. Turinger*, 67.

MANDAMUS.
Against Public Trustee. A public trustee having deeded property under the terms of a trust deed has nothing left to convey

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and mandamus will not lie against him to compel the transfer of the property to another who claims the right of redemption. *Carlson v. Howes*, 246.

Lies When. In an action for mandamus, the duty to be enforced, must be clear and definite. *C., R. & I. P. Ry. Co. v. People*, 266.

MAXIMS.

Res Ipsa Loquitur. The doctrine simply carries the case to the jury permitting it to infer negligence, and find on all the evidence whether plaintiff has sustained the burden of proof. *Colorado Springs Co. v. Reese*, 1.

The contention that the complicated character of the machinery involved excludes the application of the doctrine *res ipsa loquitur*, not approved. *Id.*

MINES AND MINING.

Possession of Tunnel—Injunction. The provisions of sec. 175 code 1908, relative to possession of mining property, are applicable to tunnels and tunnel sites, where one is deprived of possession while temporarily absent. *Primeau v. Acton*, 322.

Action for Possession—Title. In an action for possession under code sec. 175, the question of title to the property involved is irrelevant. *Id.*

Possession—Rightfulness of. One in possession of a mining tunnel cannot lawfully be deprived of the property by another who takes possession during the temporary absence of the claimant, and in an action by the latter to recover, rightfulness of possession is not an issue under code sec. 175. *Id.*

Surrender of Possession—Evidence. The claim of surrender of possession of a tunnel site is not supported by an affidavit which is only in evidence for the purpose of identification and explanation of the premises and which shows only the surrender of a mill site and not the tunnel site. *Id.*

MOTIONS.

Showing. An unverified motion, not supported by affidavit is in no sense such an affirmative showing as is required to rebut the presumption of regularity of court proceedings. *Zollinger v. Valderin*, 39.

MOTIVE.

See ASSAULT AND BATTERY.

MUNICIPAL CORPORATIONS.

Regulation of Park Driveways. In the absence of special regulations by a municipal department of improvements and parks, controlling traffic on park driveways, the general ordinances of the city will govern. *Hedges v. Mitchell*, 285.

Park Management. In the management and control of parks, a department of the city government is administrative and not governmental. *Id.*

NEGLIGENCE.

Proof—Instructions. When reliance is placed on particular acts of negligence, the proofs must be confined to those acts and the

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jury must be limited to a consideration of the specific acts charged. *Hunter v. Quaintance*, 28.

Violation of City Ordinance. The violation of a city ordinance is negligence *per se*. *Hedges v. Mitchell*, 285.

Contributory Negligence. It is not the duty of a passenger on the rear seat of an automobile to warn and guide the driver as to his route of travel, speed, etc., and his failure to do so does not constitute contributory negligence. *Id.*

Last Clear Chance. Evidence reviewed and held insufficient to carry the cause to the jury under the doctrine of last clear chance in favor of one admittedly guilty of negligence continuing to the moment of the accident. *Killian v. McCourt*, 455.

NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES.

OFFICERS.

State Treasurer. The state treasurer is only responsible for public funds in his possession until they pass out of his hands by lawful means or procedure, upon valid claims or legal loans. *People, ex rel. v. Higgins*, 79.

Jury Commissioner. A jury commissioner is not a state officer. He is an officer of the court, exercising judicial functions. *People, ex rel. v. Hersey*, 492.

PARENT AND CHILD.

Liability for Damages. A father may be liable for the tortious acts of his minor child, on the ground that his own act in permitting the child to have access to some instrumentality potent for mischief is, in view of the child's want of capacity properly to manage it, the proximate cause of the injury. *Dickens v. Barnham*, 349.

Negligence—Damages. Under the rules of negligence a parent is liable for an injury resulting from his child's use of a deadly weapon, if he ought to have foreseen that the infant might use the weapon negligently, or in a manner dangerous to others. *Id.*

Children—Residence—Jurisdiction of Juvenile Court. Minor children are residents of the county in which their father resides, the father and mother not being separated; and the fact that at the time of the commencement of a proceeding involving their custody they were temporarily in another county with their mother, would not deprive the juvenile court of the county of the father's residence of jurisdiction. *Hudson v. Mattingley*, 528.

Support of Children. In an action for separate maintenance where an allowance is made by the court for the support of the wife and children in connection with the part of the decree giving her their custody, it is not necessary that the order specify the part to be paid for the support of the children. *Badger v. Badger*, 564.

Children—Care and Custody of—Support. When a court finds upon the question of custody of minor children that their best interest requires them to be left with the mother, it is proper to order the husband to pay for their maintenance.. *Id.*

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Children—Custody of. Where a trial court finds it to be for the best interest of minor children to be left in the custody of the mother, that is a proper reason for determining the question in her favor. *Id.*

PERPETUITIES.

Charitable Bequest. The law against perpetuities has no application to public charitable gifts. *Haggin v. International Trust Co.*, 135.

PERSONAL INJURIES.

Release—Fraud. Where a person sustaining personal injuries alleged to have been caused by the negligence of a railroad company, gives a full release and settlement for a valuable consideration, he has no cause of action unless the release is vitiated by fraud in obtaining it. *D. & R. G. R. R. Co. v. Ptolemy*, 69.

Fraud—Proof. To prove fraud in obtaining a release of a claim for personal injuries, the evidence must be clear, precise and indubitable. The burden of making this proof is on the plaintiff. *Id.*

PERSONAL PROPERTY.

Possession—Issue. In an action between two purchasers of the same personalty, the issue is not whether plaintiff or defendant acquired possession first; but whether, at the time defendant took possession of the property, plaintiff was in actual, continued, visible, open, unequivocal and exclusive possession thereof. *Davis v. Patterson*, 226.

Action for Conversion—Burden of Proof. Defendant is entitled to a verdict if the evidence is evenly balanced. *Id.*

Sale—Possession—Knowledge or Information to Put on Inquiry. The question of knowledge or information to put on inquiry, under sec. 2668, R. S. 1908 concerning the sale of goods and chattels, is immaterial in an action to determine the right to personal property. *Id.*

Sales—Rescission. Where a seller, who claims fraudulent representations on the part of the buyer, fails to disaffirm the sale when he discovers the alleged fraud, and the rights of innocent third parties intervene, he cannot recover possession of the property by replevin. *Middleton v. McCarthy Co.*, 264.

PHYSICIANS AND SURGEONS.

State Board of Medical Examiners. The decision of the state board of medical examiners, on a question within its jurisdiction, will not be disturbed on writ of certiorari. *State Board v. Boulls*, 361.

Statute Construed. The words "immoral, unprofessional or dishonorable," as used in sec. 11, chap. 94, S. L. 1917, p. 359, concerning the practice of medicine, are sufficiently definite and certain, and the state board of medical examiners has jurisdiction to determine what constitutes unprofessional and dishonorable conduct and to revoke a physician's license on account of such conduct. *Dilliard v. State Board*, 575.

PLEADINGS.

Negligence—Personal Injuries. In a personal injury case the cause of action is the injury sustained by plaintiff through the

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negligence of defendant, and whether the negligence is charged specifically, generally or both, is immaterial if the pleading is not questioned. *Colorado Springs Co. v. Reese*, 1.

Res Ipsa Loquitur. If plaintiff in one count alleges negligence generally as the cause of his injury, he may rely upon the maxim *res ipsa loquitur* to establish it; if in a different count he alleges specific negligence he may rely upon any pertinent evidence to prove his case. *Id.*

Dismissal. Where it appears that the complaint fails to state any facts that would authorize the court to grant relief, the action is properly dismissed. *Platt v. Carlton*, 85.

Partnership. A complaint alleging an association of companies as common carriers is not insufficient because allegations concerning the agreement between the companies do not show a partnership, when there is no claim that they were partners. *Martin v. Union Pacific R. R. Co.*, 174.

Answer. Where the allegations of the complaint are denied, but the same matters are expressly admitted or alleged in a second defense, no issue is raised. *Cameron Bros. v. Osborne*, 199.

Complaint—Action for Possession of Real Property. In an action for possession of real property under chap. 23 of the code, a complaint is insufficient which lacks the allegation, that the plaintiff is entitled to possession, which is required by sec. 286. *Perry v. White*, 234.

Complaint—Forcible Entry and Detainer. A complaint under the forcible entry and detainer act, where the only breach is failure to pay rent, is deficient, if it does not show three days' notice in writing requiring in the alternative the payment of rent or possession of the premises. *Id.*

Complaint. An allegation in a complaint that plaintiff by mistake and error issued to the defendant 556 shares more than she was entitled to, and issued to himself 556 shares less than he was entitled to, held sufficient to constitute a cause of action. *Thomas v. Thomas*, 282.

Evidence—Burden of Proof. In an action on contract, a defense, which only sets up a different version of the contract upon which the action is brought, is to be treated as a general denial, and imposes no burden upon the defendant; but the plea of a version which would not only defeat recovery, but would justify a judgment for defendant, and is in fact presented as the basis of a cross complaint, requires affirmative proof. *Rubey v. Clammer*, 329.

Parties—Waiver. An objection on the ground of defect in parties plaintiff is waived by answer. *Terrace Irr. Dist. v. Overflow Ditch*, 362.

Amendment. A pleading may be amended to conform to the proof even to the extent of withdrawing an admission. *Moe v. Lowry*, 371.

Misjoinder. The objection of misjoinder of parties is waived by answer. *Id.*

Sufficiency of Complaint. Allegations of the complaint in an

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automobile collision case reviewed and held to state a cause of action. *Martin v. Carruthers*, 464.

Variance. A complaint stated a cause of action upon an agreement to accept drafts, and also contained allegations concerning a sale of cattle to defendant. Judgment was rendered for plaintiff on the cause of action based on the agreement, the court finding there was no sale to defendant. *Held*, that as the complaint stated a cause of action upon the agreement to accept, the allegations concerning cattle sold, could be taken as an inducement to the agreement to accept, or as surplusage, and that a claim on the part of the defense that there was a variance was not valid. *Sigel-Campion Co. v. Davis*, 511.

Parties—Waiver. Objection to a complaint, on the ground of non-joinder of parties, is waived by answer. *Id.*

Demurrer to Answer—Material Allegations to be Taken as True. In an action for the forfeiture of a bond in a criminal case, all the material allegations of the defense are, for the purposes of a demurrer to be taken as true. *Southard v. People*, 516.

Demurrer. A demurrer to a petition for the allowance of a claim against an estate admits the facts alleged. *California Ins. Co. v. Dudley*, 560.

Amendment—Equity. After remittitur from the supreme court, it was error for the trial court to deny a motion to amend the prayer of the answer, so that the relief asked would correspond with the approved findings of the court and equities of the case. *Denver T. & W. Co. v. Bartle*, 570.

Complaint. In an action for conversion, an allegation in the complaint: That plaintiffs bought from defendants, and the defendants sold and then delivered to plaintiffs the property in controversy, sufficiently alleges ownership and possession in plaintiffs. *Platt v. Walker*, 584.

PLEDGE AND PLEDGEE.

Negligence—Burden of Proof. Loss by a pledgee is *prima facie* proof of negligence, and the burden is upon him to rebut it. *Dutton Hotel Co. v. Fitzpatrick*, 229.

Pledge—Retention of Property. Where property is pledged to indemnify one for losses he may sustain, or payments made, on account of failure of pledgor to carry out the terms of a contract, pledgee is not entitled to retain the property where no losses or payments for which he could claim indemnity, are established by the evidence. *Rubey v. Clammer*, 329.

PRACTICE.

Oral Stipulations. An oral stipulation cannot be enforced in case a dispute arises between the parties as to its terms. *Mogote-N. E. D. Co. v. Gallegos*, 221.

Undisputed Facts not for the Jury. It is bad practice to leave undisputed matters of fact to the jury as questions for their determination. *Martin v. Carruthers*, 464.

PRINCIPAL AND AGENT.

Agency to Sell Real Estate. One who undertakes to sell the land of another at a stipulated price becomes the agent of the owner. *Treat v. Schmidt*, 190.

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Purchase by Agent. An agent to sell cannot purchase the property for himself unless he makes known to his principal that he is such purchaser and acquaints him with all the facts. *Id.*

Commission. An agent is not entitled to a commission on the sale of machinery where his principal negotiated the sale long prior to the making of the agency contract. *Minneapolis Steel Co. v. Yeggy*, 313.

PROBATE LAW.

Powers of Administrator. Sec. 7140 R. S. 1908, expressly confers the power upon an administrator and makes it his duty to sue for, recover and preserve the estate, both real and personal. *Grover v. Clover, Adm'r.*, 72.

Widow's Allowance. In this jurisdiction a widow's allowance is not in the nature of an interest in an estate; it is not something which goes to the widow by descent, but is a preferred claim against the estate. It is a part of the expense of administration. *Id.*

Wills—Right of Election of Widow. The probating of the will of a husband does not deprive the widow of her right thereafter to elect whether to take under the will or under the statute. *Binkley v. Switzer*, 176.

Power of Administrator to Bring Actions. The question of whether the administrator could maintain the actions, resolved in his favor on the authority of *Grover v. Clover*, 69 Colo. 72. *Regan v. Turner*, 194.

Demurrer to Petition for Allowance of Claim. Where a petition presents a claim against an estate, good on its face of some class, though not of the first as alleged, it is error to sustain a demurrer thereto, and dismiss the petition. *California Ins. Co. v. Dudley*, 560.

Claims—Classification. A claim against an estate for funds collected by decedent under an ordinary agency contract, is not of the first class. *Id.*

Amendment of Claim. On the hearing of a claim against an estate, it was proper to permit an amendment of the claim as to credits and changes in small items of account, where such items were a part of the account in litigation and the amendment did not make a different kind of claim from the one originally presented. *Chinn Co. v. Stewart*, 598.

PUBLIC UTILITIES COMMISSION.

See UTILITIES COMMISSION.

RAILROADS.

See LIVESTOCK.

Physician—Negligence. A railroad company is liable for the negligence or incompetence of a physician employed by it, only in case it appears that it knew or should have known of his unfitness. *D. & R. G. R. R. Co. v. Ptolemy*, 69.

Stock Killing Statute Construed. Under chapter 135, S. L. 1911, relative to killing of stock by railroads, the owner of stock killed is bound by the procedure therein established only when the railroad company complies with its provisions, and if the company fails in this respect, the owner may bring an action under secs. 1,

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2, 3 and 4 of the act to recover the actual value of the animals killed. *Chicago, R. I. & P. Ry. Co. v. Eyster*, 168.

Fencing Right of Way. Failure of a railroad company to maintain a fence as required by the act, is negligence *per se*, and if such negligence is the cause of the accidental killing of stock, the owner may recover. *Id.*

Stock Killing—Negligence. Under sec. 4, ch. 135, S. L. 1911, concerning the killing of stock by railroads, the killing or injury of an animal by a railway company is prima facie evidence of negligence on the part of the company. When the killing is admitted, the burden is upon the company to disprove negligence, and if it fails in this regard, it is liable for common law negligence, regardless of any question as to fences or yard limits. *D. & R. G. R. R. Co. v. Hopkins*, 203.

Liability as Warehouseman. Where there is no negligence on the part of a railroad company, it will not be liable as a warehouseman or bailee, for the loss of goods by fire. *D. & R. G. Co. v. Johnson*, 252.

Delivery of Goods—Receipt. Where goods have reached their destination and the consignee gives his receipt for the same, there is a final delivery and it makes no difference that a part of the goods are temporarily left on the carrier's premises. *Id.*

Liability for loss of goods. Where the consignee gives his receipt to a railroad company for goods shipped to him over its line, and removes a part of them, the company will not be liable for damage to, or destruction by fire of the goods remaining on its property. *Id.*

Construction of Crossings. The duty to build railroad crossings on highways, as to those laid out over railroads already constructed, is not imposed by common law. It is strictly one of statutory enactment. *C., R. & I. P. Ry. Co. v. People*, 266.

Estoppel—Crossings. A railroad company is not estopped from denying duty to maintain a bridge over its tracks, where the necessary element of estoppel, i. e., change of position by the party alleging it, is wanting. *Id.*

Dismantling—Public Utilities Commission. An order of the public utilities commission for the dismantling of a railroad should be made only when it is evident that it is justified in fairness both to the public and the investors, and only when it appears that the management of the road has in the utmost good faith made every reasonable effort to increase the earnings of the road, has managed it economically and that the public will not properly support it. *Up-to-Date Co. v. Utilities Com.*, 309.

Rates and Regulations—Attack. The validity of the rates and regulations of a common carrier cannot be determined by a court in an action for damages by a shipper; so long as operative they are binding upon both and will be enforced in fixing the liability of the parties.

The shipper has a right in any appropriate proceeding to attack the rate, regulation or classification. *Fort v. D. & R. G. R. R. Co.*, 441.

Liability for Damage to Goods by Freezing. Under the common law a carrier is not liable for losses or injuries resulting from

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the inherent nature of the goods, which would not have been prevented by the exercise of ordinary care upon its part.

Under this rule freezing of potatoes will be held to be caused by the nature of the property so as to exempt the carrier from liability, provided it has been guilty of no previous negligence or misconduct which can be considered the proximate cause of the injury. *Id.*

REAL ESTATE BROKERS.

See BROKERS.

REAL PROPERTY.

Unacknowledged Deed. An executed, but unacknowledged deed, if delivered, is sufficient to pass title. *Durango Trust Co. v. Campbell*, 49.

Delivery of Deed—What Constitutes. The very essence of the delivery of a deed is the intention of the parties, which is to be gathered from their conduct and the surrounding circumstances. *Id.*

Limited Estate. The policy of the law does not permit property to be so limited as to remain in the grantor for life, free from the expense of property and not subject to his debts. *Grover v. Clover, Adm'r.*, 72.

Lease—Construction a Question for the Court. What a lease contains is a question for the court and ought not to be submitted to a jury for determination. *Perry v. White*, 234.

Public Trustee—Trustee's Deed. A deed was issued by a public trustee one day before the expiration of the nine months period of redemption prescribed by section 6869, R. S. 1908. In an action against the trustee to compel the issuance of a second deed to a judgment creditor who claimed the right of redemption, *Held*, that the first deed, although irregular, passed the legal title, and the power of sale was extinguished, so far as the trustee was concerned. *Carlson v. Howes*, 246.

Trust Deed—Redemption—Assigns. Under sec. 6868, R. S. 1908, providing that the assigns of a grantor may redeem from a sale under trust deed, "assigns" includes the assignee of the equity of redemption. *McKee v. Elwell*, 316.

Conveyance—Title. An unqualified agreement to convey real property imports that a title to which vendee cannot lawfully complain will be furnished. A tax title is not such. *Heaton v. Nelson*, 320.

Agreement to Convey—Rescission—Tender. If the vendor cannot furnish or refuses to furnish a good title when due or in a reasonable time, the vendee may rescind, defend a suit for the unpaid purchase money and recover what has been paid. *Id.*

A tender of the purchase price by the vendee before rescission, is not necessary. *Id.*

Setting Aside Deed—Degree of Proof. To set aside duly and formally executed instruments conveying title to real property on the ground of fraud, the evidence must be of greater strength and probative force than in ordinary civil cases; to warrant such relief, it must be direct, strong, highly convincing, clear, precise and indubitable. *Mathews v. Mathews*, 333.

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Trust Deed—Release by Mistake. The beneficiary under a trust deed released her lien and took a new trust deed in ignorance of an intervening judgment lien not disclosed by the abstract of title. In these circumstances she was not guilty of any negligence which would bar her or her successor in interest from relief in equity. *Lawson v. Whitley*, 346.

Restoration of Mortgage Lien. The release of a mortgage in ignorance of an intervening judgment is generally held in equity to be a mistake, and the lien of the mortgage will be restored where it is shown that complainant was not guilty of negligence. *Id.*

Deeds—Construction. In construing written instruments courts should seek for and give effect to the actual intent of the parties, when such intent is manifest. *Millage v. Churchill*, 457.

Construction of Deed—Parol Evidence. In an action involving the effect of a limitation clause in a warranty deed, it was not error to exclude testimony proffered as to prior declarations of the deceased grantor relative to disposition of the property when it was apparent that the terms of the limiting clause were repugnant, hopelessly conflicting and incapable of being harmonized by parol testimony. *Id.*

Deeds—Limitation Clause—Construction. In the construction of a warranty deed containing a limitation clause the terms of which are too indefinite, conflicting and ambiguous to permit of interpretation and enforcement with any degree of certainty as to the real intent and purpose of the grantor, the granting clause, which is clear and unequivocal, will control. *Id.*

Contract of Sale. Where the owner of real property makes a specific offer to sell, through a real estate broker, which offer is accepted by a purchaser, the negotiations being evidenced by letters and telegrams between the owner and broker, the transaction constitutes such a contract as may be specifically enforced. *Carlsen v. Hay*, 485.

Specific Performance—Damages. Where the owner fails to carry out a contract for the sale of real property, and at the time of the trial it was beyond his power to specifically perform, a judgment against him for damages was sustained. *Id.*

RECALL.

Recall of Judge. Under Art. XXI of the constitution, which authorizes a recall from office, the circulation of a petition for the recall of a district judge is not contempt of court, where the facts set out in the petition are truthfully stated, though with uncalled for bitterness. Such a petition is privileged. *Marians v. People*, 87.

RECEIVERS.

Duties. A receiver should sue on a note in his hands for the reason, among others, to escape the statute of limitations. *Van Gilder v. Parker*, 196.

Claims. It is not the duty of a receiver to look after and prosecute claims of creditors against the receivership estate. *Pecte v. Renshaw*, 530.

Final Orders—Notice. Final orders winding up a receivership are not invalid on account of lack of notice to non-resident claimants not represented by resident counsel. *Id.*

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Petition to Set Aside Final Report—Delay. After a delay of three years from the commencement of the suit and one year from the final report and discharge of the receiver, a petition of one who has not presented his claim to the court for final allowance, to set aside the receiver's report and discharge and to be allowed to present his claim and have a re-distribution of the trust estate, will not be granted. *Id.*

REPLEVIN.

Verdict—Judgment. In a replevin action where the verdict is primarily for possession of the property in suit, judgment should be for possession of the property, and for the value thereof only in the event that recovery of the specific property may not be had. *Wigton v. Wigton*, 19.

RIGHTS AND REMEDIES.

Decree. In an action by stockholders of a corporation against one who has obtained stock in the company without consideration, the relief granted is sufficient if there is a correct enforcement of the rights of the parties as shown by the evidence. *Moe v. Lowry*, 371.

Rescission. While it is a corollary of the law of rescission that a party cannot retain property and also recover secret profits; if rescission is impossible, the wronged parties are not barred from all remedy, and that remedy is proper which gives them what the consideration furnished by them actually purchased. *Id.*

SCHOOLS.

Teaching Contract. A teacher's contract with a school board, the execution of which begins after the expiration of the term of office of one of the members, is not invalid for that reason, and the board will be liable for a breach thereof. *School District v. Gigax*, 161.

SLANDER.

Evidence. In an action for slander, evidence with reference to a prosecution for lunacy instituted by the defendant, is relevant on the questions of good faith and malice. *Wertz v. Lawrence*, 540.

Publication. Further publication by the plaintiff of the slander is no defense. *Id.*

Probable Cause. Probable cause is no justification in an action for slander. *Id.*

Damages—Proof. Falsely charging a school teacher with insanity is actionable *per se*, and proof of specific damages is unnecessary. *Id.*

Excessive Damages. A verdict for $1500 in an action for slander, not disturbed as excessive. *Id.*

SPECIFIC PERFORMANCE.

See CONTRACTS; REAL PROPERTY.

STATUTES.

Reasonableness of. Courts have no concern with the wisdom or reasonableness of legislative acts. *Martin v. People*, 60.

Constitutionality. Chap. 122, S. L. 1917, providing *inter alia*, that school funds may be loaned on unencumbered cultivated farm

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lands within the state of Colorado, is not in conflict with sec. 1, art. II; sec. 25, art. V, or sec. 12, art. X of the state constitution, and is constitutional. *People, ex rel. v. Higgins*, 79.

Application. Sec. 6, c. 192, S. L. 1907, concerning the liability of hotel keepers for baggage left in their charge, applies to baggage left for safe keeping only, not to that in pledge. *Dutton Hotel Co. v. Fitzpatrick*, 229.

TAXATION.

Illegal Levy—Action. The mere fact of a levy of an illegal or void tax does not entitle the taxpayer to enjoin its collection, and a court of equity will not entertain jurisdiction for that purpose unless there exists also some recognized equitable ground for the granting of relief. *D. & R. G. R. R. Co. v. Commissioners*, 212.

Illegal Levy—Appropriate Action. Sec. 5750, R. S. 1908 affords an adequate remedy in case of an illegal or erroneous levy. *Id.*

TELEGRAPH COMPANIES.

Interstate Carriers—Federal Questions. Under the interstate commerce act as amended June 18, 1910, all controverted matters pertaining to rates and regulations of telegraph companies doing an interstate business, are exclusively federal questions and state courts are bound by the federal decisions thereon. *Ryan v. Colo. Post. Tel. Co.*, 542.

Liability for Non-delivery of Telegram. The conditions upon the back of a telegraph blank furnished by a company doing an interstate business, to the effect that the company shall not be liable for mistakes, delays or non-deliveries beyond the cost of the telegram, if it be an unrepeated message, and not more than fifty times such cost if it be a repeated message, held to be valid and binding, notwithstanding the admitted negligence of the company and great loss occasioned by its failure to deliver a message. *Id.*

TENDER.

In Action for Cancellation of Deed. In an action for the cancellation of a deed, a statement in the complaint that plaintiff brings the sum received for the property into court for delivery to defendant, constitutes a sufficient tender. *Treat v. Schmidt*, 190.

When not Necessary. A formal and technical tender of money is not necessary when the actions of the party to whom it is to be made show that it would not be accepted. *Flora v. Glover*, 210.

TRIAL.

Remarks of District Attorney. The district attorney in the course of his argument to the jury said, "In my opinion, gentlemen, this is the strongest case of those tried." Upon objection, the court stated to the prosecutor, "Every case must stand upon its own bottom." *Held*, that while the remark was improper, under the circumstances, it did not constitute reversible error. *Manzoli v. People*, 131.

Nonsuit. It is error to grant a nonsuit where there is sufficient evidence to require the submission of the case to the jury. *Tamarkin v. Denver Tramway Co.*, 204.

Directed Verdict. Where under the undisputed evidence and law applicable thereto the plaintiff ought not to recover, on motion

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a verdict should be directed for defendant. *D. & R. G. R. R. Co. v. Komfala*, 318.

Questions for Jury—Negligence and Proximate Cause. In an action against a father for personal injuries inflicted by his minor son, the questions of negligence and proximate cause are for the jury. *Dickens v. Barnham*, 349.

Questions for Jury. In an auto accident case, whether plaintiff drove too fast or neglected to lower his speed, are questions of fact for the jury. *Martin v. Carruthers*, 464.

Argument of Counsel. Failure to specifically instruct the jury to disregard portions of the argument of counsel, is not ground for reversal, where there is evidence, though very slight, upon which the fact could be claimed to be as assumed by counsel in his argument. *Wertz v. Lawrence*, 540.

Remarks of Counsel. Where it does not appear that the remarks of counsel, of which complaint is made, influenced the jury in arriving at its verdict, or resulted in substantial prejudice, the judgment will not be reversed on that ground. *Railway Mail Ass'n v. Jeffrey*, 569.

TRUSTS.

Municipal Corporations—Powers. The City and County of Denver is by express provision of the constitution authorized to accept gifts of the character under consideration, and is capable of taking the property and executing the trust in accordance with the provisions of the will. *Haggin v. International Trust Co.*, 135.

Jurisdiction. Courts have original inherent jurisdiction over charitable gifts and trusts. *Id.*

UTILITIES COMMISSION.

Powers—Police Power and Right of Eminent Domain Distinguished. A railroad crossing may be ordered put in under the police power of the state; but land may be taken for a street only by the exercise of the right of eminent domain. *C., B. & Q. R. R. Co. v. Utilities Com.*, 275.

Powers. The public utilities commission is without authority to order the opening of a street across a railroad right of way. *Id.*

Finding of Fact. A finding of fact by the public utilities commission which is justified by the evidence, will not be disturbed on review by the supreme court. *Burlington G. & E. Co. v. Utilities Com.*, 359.

Jurisdiction—Home Rule Cities. The state public utilities commission has no authority to regulate telephone rates in a city, which, after the passage of the home rule amendment in 1912, S. L. 1913, p. 669, adopted a charter giving it control of the rates to be charged by public utilities within its limits. *City v. Utilities Com.*, 554.

VENDOR AND VENDEE.

Fraud—Misrepresentations. The agent of the owner represented to a purchaser of property that it was listed with him for $1500 when in fact it was listed at the value of $800. *Held*, that this was a flagrant misrepresentation as to the sum for which the property could be purchased, and therefore as to value. *Bigger v. Hollworth*, 451.

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Fraud—Representations. In the sale of a restaurant property the amount of income and profits derived from the business is peculiarly within the knowledge of the owner and the purchaser is justified in relying upon the representations of the seller in that respect. *Id.*

Purchase Money—Payment. A broker acting for defendants, sold a rooming house to plaintiff receiving $1,000 to apply on the purchase price; of this amount he retained $750 as his commission, delivering the balance to defendants. *Held*, that in legal effect, defendants received from plaintiff $1,000 of her money as a part of the purchase price. *Spencer v. Brundage*, 520.

WATER RIGHTS.

Quieting Title—Statute of Limitations. In an action to quiet title to irrigation ditches, one who pleads that the seven year statute of limitations is not required in the first instance to either prove payment of taxes or nonassessment. *Frey v. Paul*, 244.

Abandonment—Decree. A decree enjoining diversion of a part of an appropriation of water is valid as to the parties to the proceeding, and in this case is not invalid because it fails to specify on whom the loss of the abandoned portion should fall, that being a question to be settled in another suit. *Terrace Irr. Dist. v. Overflow Ditch*, 362.

Abandoned Water Right—Innocent Purchaser. A water right being intangible, when abandoned has no existence in fact or theory.

There can be no such thing as an innocent purchaser of an abandoned water right. *Id.*

Reservoir Contracts—Public Policy. A contract with a reservoir company, which is constructing a storage reservoir, for the sale of water rights therein upon a status of equality based upon its capacity to store, with a clause enjoining diligent effort to conserve all the available flow, and absolving the company from liability if less than the maximum capacity is obtainable, is not against. but in conformity with public policy. *Antero Co. v. Lowe*, 409.

WILLS.

Construction. The rule paramount in the construction of wills is to have due regard to the directions of the will, and the true intent of the testator derived primarily from the language of the will itself, and if this is not contrary to positive rule of law. or is not opposed to sound public policy, then the will must be given the effect its language imposes. *Haggin v. International Trust Co.*, 135.

Charitable Bequest. A will provided that proceeds of certain property should be devoted to the construction of an ornamental gate or arch in the civic center of the city of Denver, with a simple inscription thereon, as a memorial to the testator and his wife. *Held*, that the bequest was for a charitable purpose within the meaning of the law. *Id.*

Validity of Bequest. A charitable bequest is not rendered invalid because trustees are not named, nor because a trustee incapable of taking it, is named. *Id.*

Bequests. A will devised to the widow an undivided half of the estate of decedent for life, remainder to a brother and sister and

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three children and the residue to another. The widow elected to renounce under the will and take under the statute. A judgment declaring void a part of the bequests, held objectionable; the interest of the widow should be derived from the entire estate and the interests of the beneficiaries abated proportionally under section 7239 R. S. 1908. *Binkley v. Switzer*, 176.

Reciprocal Wills—Contract. Where there is an agreement between two parties to execute reciprocal wills, the contract is based on the two wills considered together and so construed. Thus construed they constitute a written contract based upon mutual definite and expressed considerations. *Brown v. Johanson*, 400.

Reciprocal Wills—Enforcement of Provisions. Where mutual or reciprocal wills have been made pursuant to an agreement which has been executed by one of the testators dying without having made any different testamentary disposition of his property, and the other has accepted the benefits accruing to him under the will of the deceased, the agreement becomes obligatory upon the survivor and may be enforced in equity against his estate. *Id.*

WITNESSES.

Cross Examination. A wide latitude is allowed in the cross examination of witnesses upon matters which bear upon their credibility. *Tarling v. People*, 477.

Defendant in Criminal Case. When a defendant in a criminal case offers himself as a witness in his own behalf, he is subject to the general rules of examination applicable to other witnesses, including examination as to matters which tend to show him unworthy of belief. *Id.*

Examination of—Discretion. Courts regard as an abuse of discretion the admission of any evidence in a criminal case the only reasonable effect of which would be to prejudice the jury against the defendant. *Id.*

Credibility—Former Conviction. It is permissible to prove a former conviction of crime as bearing upon the credibility of a witness, but the showing must be limited to evidence of conviction. Questions as to indictment, arrest, commission of offenses or immoral acts, are not permitted. *Id.*

Credibility—Impeachment—General Reputation. In impeaching a witness the inquiry should be to his reputation for truth and veracity rather than to his moral character, and the inquiry should go to his general character or reputation for veracity, and not to specific acts. *Id.*

Impeachment of. Impeaching questions must not be upon collateral, irrelevant or immaterial matters.

The test of whether a fact inquired of in cross examination is collateral, is: Would the cross examining party be entitled to prove it as a part of his plea? If not, the matter is collateral to the issue. *McKee v. People*, 580.

WORDS AND PHRASES.

"*To submit*," defined. *Noland v. Hayward*, 181.

"*District Greater Than a County*" is intended to refer to that kind of a district which is commonly greater than a county. The coincidence of the boundaries of a district with those of a county

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in a particular instance is of no consequence. *Brown v. Van Cise*, 242.

WORKMEN'S COMPENSATION.

Statutory Construction. Under sec. 8, chap. 179, S. L. 1915, p. 522, providing when the right to compensation shall obtain, it is necessary that both the service being performed and the injury sustained shall arise out of and in the course of employment. *Industrial Commission v. Anderson*, 147.

Act Construed. The intent is to make the industry responsible for industrial accidents only, and not those resulting from hazards common to all. *Id.*.

Accident Occurring While on the Way to or from Work. In the absence of special circumstances bringing the accident within the scope of the employment, no compensation is recoverable by a workman who is injured while on his way to or from work. *Id.*

Industrial Commission—Practice. A suit cannot be maintained in the district court to review the action of the Industrial Commission, where the plaintiff has failed to petition the commission for a revew under the provisions of secs. 97 and 98, chap. 210, S. L. 1919. *Midget Consolidated G. M. Co. v. Industrial Com.*, 218.

Procedure. Where it appears on the trial of a cause brought in the district court to review an award of the Industrial Commission, that no petition for a review was filed with the commission before bringing the action, the proper procedure is to dismiss the suit. *Id.*

Finding of Industrial Commission. The appellate court will not reverse a finding of the Industrial Commission on the weight of the evidence, in reviewing a judgment of the district court. *Employers Co. v. Morgulski*, 223.

Marriage. Evidence concerning marriage of claimant and deceased employe reviewed and held to establish the claim that they were husband and wife. *Id.*

Industrial Commission—Findings of Fact. It is duty of the commission to make sufficiently detailed findings of fact so that the courts can determine whether the order or award is supported by the facts.

Statements which amount to mere conclusions are not sufficient. *Prouse v. Industrial Com.*, 382.

Accident. An accident under the various workmen's compensation acts, must be traceable to a definite time, place and cause; the occurrence constituting an accident must be unexpected and must be the proximate cause of death, where death results, or of the disease which produced the death. *Id.*

Appeal and Error—Review of Evidence—Industrial Commission. The appellate court cannot review an industrial commission case on the evidence, but where the evidence is undisputed it may be treated as the findings of fact and considered accordingly. *Id.*

Industrial Commission Findings of Fact. It is the duty of the commission to make sufficiently detailed findings of fact so that the courts may determine whether the order or award is supported by the facts. *Billick v. Industrial Com.*, 471.

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Review of Evidence in Industrial Commission Cases. The appellate court cannot review an industrial commission case on the evidence where any of the facts are in dispute. *Id.*

Disease—Accident. A workman in an alfalfa mill had organic heart disease. His strenuous labor of pitching hay in an enclosed building, combined with breathing the dust ladened air, brought on an attack of heart trouble causing instant death. *Held*, that death resulted from an injury proximately caused by accident, and that the dependents were entitled to compensation. *Carroll v. Industrial Com.*, 473.

Industrial Commission—Practice—Petition for Rehearing. A claim before the industrial commission was denied. Petition for rehearing was filed and the commission vacated its first order, took further testimony and again denied the claim. *Held*, that it was unnecessary to file a second petition for rehearing before taking the case to the district court. *Id.*

Industrial Commission—Findings. It is the plain duty of the commission to make specific findings reciting all facts important in the history of the case, as well as specific findings of fact bearing upon the contentions of the parties from the testimony adduced. Mere conclusions of law will not suffice. *Weaver v. Industrial Com.*, 507.

Industrial Commission—Findings—Evidence. Where the findings of fact of the commission and the evidence contained in the record are insufficient upon which to determine the issue presented, the cause will be remanded to the commission for further investigation. *Id.*

Jurisdiction of Supreme Court. Under the Workmen's Compensation act, the appellate court can review questions of law only. It cannot review or determine the facts. *Olson-Hall v. Industrial Com.*, 518.

Industrial Commission—Findings of Fact. In a proceeding under the workmen's compensation act, it is the duty of the industrial commission to make sufficient specific findings of fact, and where it fails to do so, a cause which has been brought to the supreme court for review will be remanded for further findings. *Id.*

Non-resident Dependents. Under sec. X, chap. 155, S. L. 1917, not to exceed $1,000 shall be paid to non-resident dependents in any case, regardless as to the number of them, times of payment, or whether under original or subsequent awards. *Industrial Com. v. C. F. & I. Co.*, 524.

Method of Payment. The method of payment of compensation under the workmen's compensation act rests within the discretion of the industrial commission, and its orders will be set aside by the courts only on the ground that they were procured by fraud, are unsupported by the findings of fact, or beyond its powers. *Kokotovich v. Industrial Com.*, 572.

Lump Sum Settlement. No fixed rule can be laid down for determining whether weekly compensation or a lump sum should be allowed a claimant under the workmen's compensation act. In most

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cases, the controlling factors must be the character, capacity and business ability of the claimant. *Id.*

Industrial Commission Orders—Review. In the absence of abuse of discretion by the commission, the court of review may consider only the legal question of whether there is evidence to support the findings. *Id.*

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